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GENERAL LAND OFFICE
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DECISIONS
RELATING TO
THE PUBLIC LANDS.

OKLAHOMA LANDS—COMMUTATION—FINAL PROOF.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 9, 1895.

REGISTERS AND RECEIVERS

Perry, Enid, Alva and Woodward, Oklahoma Territory.

GENTLEMEN: Your attention is called to the provisions of the first paragraph of section 19, of the act of Congress, approved August 15, 1894, entitled "An Act making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," which reads as follows:

That the right of commutation is hereby extended to all bona-fide homestead settlers on the lands in Oklahoma Territory opened to settlement under the provisions of the act of Congress entitled "An Act making appropriations for current and contingent expenses and fulfilling treaty stipulations with Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-four," approved March third, eighteen hundred and ninety-three, and the President's proclamation in pursuance thereof, after fourteen months from the date of settlement upon the full payment for the lands at the prices provided in said act.

The land affected by said provision is that portion of the Cherokee Outlet, which was opened to settlement and entry on September 16, 1893, including the lands formerly embraced within the Tonkawa and Pawnee Indian reservations, also opened to settlement and entry on said date.

Applicants to commute their homestead entries under said provision will be required to show compliance with the homestead law for fourteen months from the date of settlement and to the date of proof and, if foreign-born, to furnish evidence of naturalization, the same as in five year proof, under section 20, act of May 2, 1890 (26 Stats., 81). They will be required to pay for the land as provided in the tenth and thirteenth sections of the act of March 3, 1893 (27 Stats., 640), the same as though they were making five year proof, excepting the regular final homestead commissions; but no additional payment, for the privilege of commutation, will be required to be made.

The interest required to be paid will be computed from the date of

entry to the date of final payment as required by statute, and where the proof is made outside of the land office and transmitted by mail, it must be accompanied by a sufficient sum to meet the interest computed to the date when the receiver's receipt is issued. The proof and final affidavit, in such cases, will be made upon the regular homestead blanks, modified as the circumstances require, and, in each case, must be accompanied by an affidavit of form 4-102 c, properly modified.

A cash certificate and receipt forms 4-189 and 4-131, respectively, will be issued, if the proof is satisfactory, and the same will be reported upon the regular abstract of lands sold. You will, however, indicate upon the cash receipt, and upon the abstracts, the several amounts respectively paid for principal and interest.

As the time has arrived when it is possible for parties, entitled to credit for four years military service, to make final proof upon their entries for land in your districts, I deem it proper to advise you that when final proof and payment are made for said lands, a final homestead certificate (form 4-196), and a final homestead receipt for the final commissions (form 4-140) will be issued in addition to a cash receipt (form 4-140-a) for the final payment, but no cash certificate is required. The cash receipts will bear the regular cash series of numbers, and the money will be reported on the regular abstract of cash sales, with a marginal reference to the homestead entry by number upon which the payment is made. Said receipts will be issued in duplicate and the duplicate given to the party as in ordinary cash sales. You will indicate upon the cash receipt and abstracts the amount paid respectively for principal and interest.

Very respectfully,

EDWARD A. BOWERS,

Acting Commissioner.

Approved,

HOKE SMITH, *Secretary.*

SOLDIERS' ADDITIONAL HOMESTEAD—ACT OF AUGUST 18, 1894.

MEE v. HUGHART ET AL.

The act of August 18, 1894, validating soldier's additional homestead entries, made under certificates of right, does not operate to defeat the right of a successful contestant under a decision that has become final prior to the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, January 10, 1895. (C. W. P.)

I have considered the petition of Louis Stegmiller, one of the defendants in the above entitled case, filed September 14, 1894, to vacate and set aside the departmental decision of June 18, 1894, in the case of Edward W. Mee against S. W. T. Hughart and others, affirming the decision of your office of December 19, 1892, affirming the judgment of the local officers, sustaining Mee's contest of soldier's additional homestead entry, made in the name of said Hughart, July 15, 1889, and recommending the cancellation of said entry.

The land involved is the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 35, T. 63 N., R. 13 W., Duluth land district, Minnesota.

Notice of the decision of the Department was mailed by your office to the resident attorneys of the defendants, on the 2d of July, 1894, and the time allowed for filing a motion for review, or for rehearing, expired on the 4th day of August following, (*Shields v. McDonald*, 18 L. D., 478) when the preference right of entry of Mee, as contestant, attached. *Pomeroy v. Wright* (2 L. D., 164).

The act of May 14, 1880, (21 Stat., 140) gave the successful contestant a right of entry; and the provision in the act of Congress, approved August 18, 1894, (Public Act No. 200),—

That all soldier's additional homestead certificates heretofore issued under the rules and regulations of the General Land Office, under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, or the Commissioner of the General Land Office, shall be, and are hereby declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been, or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees—

on the last clause of which the petitioner bases his claim for the vacation of the departmental decision cancelling the entry in question, cannot be interpreted to divest the contestant of his preference right of entry secured to him as a reward for the time and money spent by him in prosecuting to judgment a contest against a violator of the land laws.

The intent of the act of August 18, 1894, was to afford relief to those who had violated the law; but surely, it did not contemplate the spoliation of one whose only offence was that he had spent his time and money, in reliance upon the good faith of the government.

The petition to vacate, is therefore denied and dismissed.

CONTEST—IMPROVEMENTS—RELINQUISHMENT.

WINN *v.* SAUNDERS ET AL.

The Land Department has no jurisdiction over disputes between settlers and entrymen concerning their claims against each other on account of alleged improvements.

A relinquishment filed during the pendency of a contest leaves the land open to entry by the first legal applicant, subject only to the preferred right of the successful contestant; and other contests then pending against said entry necessarily abate on the cancellation thereof.

Secretary Smith to the Commissioner of the General Land Office, January 10, 1895. (J. I. H.) (J. L.)

The case now before me for supervision and review, is not correctly entitled in the caption. It is the case of Sue McElhany and John

McNeish against Henry Saunders; and it is brought here by the appeal of one John L. Winn, which was allowed by your office.

The tract of land involved, embraces lots 1 and 2, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Section 7, T. 11 N., R. 3 W., of the Indian meridian, Oklahoma Territory. and contains 157.69 acres.

From the record before me, I gather the following facts:

On May 2, 1889, Henry Saunders made homestead entry, No. 656, of said tract.

On July 17, 1889, Sue McElhany filed her affidavit of contest against said entry, alleging only prior settlement.

On November 7, 1889, John McNeish filed his affidavit of contest against said entry, and also against Sue McElhany, the first contestant, alleging that neither Saunders nor McElhany could be permitted to enter or acquire any right to said tract of land, because they had both entered and occupied lands in Oklahoma Territory prematurely, in violation of the act of Congress and the President's proclamation.

On November 11, 1889, John L. Winn filed his affidavit of contest against Saunders' entry, alleging that Saunders was disqualified by reason of his premature entrance into the Territory. But Winn made no charges against either Sue McElhany or John McNeish.

The case was put off on one pretext or another for several years. At length the local officers ordered a hearing between McElhany and McNeish, first and second contestants on the one side, and Saunders, the entryman, on the other. The hearing began in March, 1893. Seven responsible witnesses were introduced by the contestants, and they severally positively testified that Saunders, the entryman, and McElhany, the first contestant, had both come into the Territory ahead of time. The testimony of said seven witnesses, uncontradicted, was deemed conclusive evidence. It seems to me that it was the duty of the local officers then and there to recommend that Saunders' entry be cancelled, and that the preference right of entry be awarded to McNeish, whose qualifications as an entryman were not impeached.

It seems that McNeish, the successful contestant against Saunders, was sick and personally absent from the hearing. Whereupon, the local officers, instead of deciding the case, continued it until April 11, 1893; and advised the entryman and first contestant to improve the interval by endeavoring to make some compromise with McNeish; basing their advice upon their idea that when McNeish got the land, he ought in justice and equity to pay Saunders and McElhany something for their improvements.

I cannot approve said action of the local officers. The Land Department has no jurisdiction over disputes between settlers and entrymen about their claims against each other on account of alleged improvements. Upon the facts stated, it was the duty of the local officers to decide the case, award the preference right of entry to McNeish, and

leave him and his adversaries, Saunders and McElhany, to settle their private matters, outside of the land office, either amicably, or in the courts.

Nevertheless, the three parties above named, acting in good faith upon the advice of the local officers, agreed upon a compromise. They found one Michael Stoll, a qualified entryman, who was willing to pay \$4,000 for the tract of land, with all the improvements thereon, and was willing to let Saunders, McElhany and McNeish divide the \$4,000 to suit themselves, provided the proper authorities of the United States—in his view, the local officers—would give him assurance of a valid and lawful homestead entry.

It is unnecessary to follow the details of the negotiations between the parties. On April 6, 1893, Henry Saunders filed his relinquishment, and the local officers cancelled his entry, as appears by the document now before me. Instantly thereafter, the tract of land became open to entry by any qualified entryman, subject only to McNeish's preference right as a successful contestant, to enter within thirty days after notice of the cancellation. With the cancellation of Saunders' entry, all contests against it necessarily and logically abated. McElhany's pretended dismissal of her contest, was surplusage. She could not be permitted to enter or acquire any title to the land. McNeish's dismissal of his contest was valid only as an express waiver of his preference right.

Whereupon, Michael Stoll being present, and apparently duly qualified, made homestead entry, No. 6796, of the tract of land aforesaid. In the dialect of the local land offices, it is apparent that Stoll bought Saunders' relinquishment, in other words, he paid a sum of money to induce Saunders to restore the land to the public domain, in order that he, Stoll, might be able to make homestead entry of it. The whole record shows that Mr. Stoll has acted in good faith openly, and under advice which he believed to be safe and reliable.

It follows necessarily and logically from the foregoing facts—which are conceded by all parties—that the contest of John L. Winn, the third contestant, who made no charges against either McElhany or McNeish, and filed no application to make entry of said land, was abated, and came to naught when Saunders' entry was cancelled. The work which he offered to undertake to do, if the prior contestants failed, was accomplished.

Winn was no party to the controversy then and there, and as aforesaid, ended. He had no right to appeal.

Your office decision is hereby affirmed. Winn's appeal is dismissed, and Michael Stoll's homestead entry will be held intact, subject to compliance with the homestead laws.

TIMBER AND STONE ENTRIES—FINAL PROOF.

SARAH L. BIGELOW.

Republication of notice of intention to submit timber land final proof will be required, where the witnesses who testify on behalf of the purchaser are not those named in the published notice.

The non-mineral affidavit usually required of agricultural claimants should be furnished by purchasers under the timber land act; but where an entry has been allowed on an affidavit that is substantially the same as that prescribed by the Department, a new affidavit need not be furnished.

Secretary Smith to the Commissioner of the General Land Office, January 10, 1895. (J. L. McC.)

Sarah L. Bigelow has appealed from the decision of your office, dated August 25, 1893, suspending her entry, under the timber-land act, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 8, T. 39 N., R. 1 W., Redding land district, California, for lack of a non-mineral affidavit, and because the witnesses who testified at her final proof are not mentioned in the published notice.

The advertisement of final proof named as witnesses, Frank Stone, William S. Russell, J. E. Hogeboom, and George Lemase. The witnesses who actually appeared were Robert P. Wilson and Charles H. Wheeler.

In the case of entries under other laws for the disposal of the public domain, the Department has uniformly demanded republication of notice when witnesses other than those originally named were substituted. In the case of Amos E. Smith (8 L. D., 204), republication was demanded because the name of one of the witnesses, "J. S. Ferson," was by a typographical error misprinted, "J. S. Keeson." Republication was demanded, because of the substitution of a witness, in the case of the pre-emption cash entry of Wenzel Paours (8 L. D., 475); of George F. Lutz (9 L. D., 266); of Herbert Higgins (9 L. D., 646); and many others. In the case at bar, not only was there the substitution of one witness, but neither of the witnesses that appeared and testified was named in the advertisement. The same reason for using witnesses whose names have been advertised, exists in the case of timber-land entries as of other entries; and I think your office was correct in demanding republication in the case now under consideration.

There remains to be considered the question whether your office was correct in demanding a non-mineral certificate. By circular of April 27, 1880, your office directed registers and receivers that "when any party applies to enter any tract under any of the laws relating to agricultural lands, he will be required to make the usual non-mineral affidavit." Your office appears to have uniformly construed this instruction to include lands entered under the timber-land law; at least, local officers have demanded and received non-mineral affidavits from timber-land applicants in all the States to which the timber-land law applied

(previous to its extension to all the public land States by act of August 4, 1892), with occasional exceptions in California. Upon the passage of the last named act, your office called upon the local offices in California to require a similar affidavit of applicants to make timber-land entry in that State.

The Department has prescribed a form of non-mineral affidavit applicable to all entries of the public land (form 4-062, General Circular, page 245), in accordance with which the applicant must swear that he is well acquainted with the character of the land which he desires to enter, "and with each and every legal subdivision thereof," stating the sources of his knowledge and information:

that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land.

It seems to me proper that this affidavit should be required in all entries of non-mineral lands; and your office is hereby directed to require the same in the case of all entries made under the timber and stone act hereafter.

In the present case, however, it appears that the claimant has substantially complied with the law by making an affidavit that she has personally examined the land, and from such personal examination knows that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited, and contains no mining or other improvements except those belonging to the claimant, nor, as she verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal. This is substantially the non-mineral affidavit prescribed by the Department. The case being *ex parte*, and the entry having been already made, I see no reason for requiring an additional non-mineral affidavit.

The decision of your office is modified as above indicated.

OKLAHOMA-CHEYENNE AND ARAPHOE LANDS.

CIRCULAR.¹

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 13, 1892.

REGISTERS AND RECEIVERS,

Kingfisher and Oklahoma City, Oklahoma Territory.

GENTLEMEN: I have to call your attention to the proclamation of the President of the twelfth instant, together with the schedule of lands,

¹ Not heretofore published. See circular of June 8, 1893, 17 L. D., 52; also circular of February 14, 1894, 18 L. D., 50.

copies of which are hereto attached, by which the lands described in that schedule are laid open to settlement under the statutory provisions therein recited, at and after the hour of twelve o'clock noon, central standard time, of Tuesday the nineteenth day of this, the present month of April, being certain tracts embraced in the cession of the Cheyenne and Araphoe Indians, by agreement ratified and confirmed by the act of Congress of March 3, 1891 (26 Stat., 989).

You will consider said proclamation, the statutes therein referred to of March 2, 1889, May 2, 1890, and March 3, 1891, and the departmental circular of July 21, 1890 (11 L. D., 79), in reference to the disposal of lands in Oklahoma.

With regard to the lands described in the schedule, you will observe that the act of March 3, 1891 (26 Stat., pp. 989 to 1044), sec. 16, provides for the disposal thereof,

To actual settlers only, under the provisions of the homestead and townsite laws (except section 2301 of the Revised Statutes of the United States, which shall not apply); *Provided, however*, That each settler on said lands shall, before making a final proof and receiving a certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, and within 5 years from the date of the first original entry the sum of \$1.50 per acre, one-half of which shall be paid within two years. But the rights of honorably discharged Union soldiers and sailors as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid, and all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry.

In regard to homestead entries, you will proceed under general instructions of said circular of July 21, 1890 (11 L. D., 79), and instructions therein referred to.

Townsite entries may be made under the general townsite laws as modified by the first proviso to section 22, act of May 2, 1890 (26 Stat., 92), in regard to which, you are referred to circular of July 9, 1886 (5 L. D., 265), or they may be made under the special provisions of the second proviso to said section 22. In regard to cases of the latter class, instructions may be found in circular of July 18, 1890 (11 L. D. 68), as modified by Secretary's decision of December 16, 1891, Orlando townsite (13 L. D., 700).

The western boundary of the lands occupied by the Wichita Indians under the unratified agreement of October 19, 1872, is not laid down on the township plats, and, therefore, it is impossible to determine what lands in townships 8 to 15 north, range 14 west, fall without the said western boundary, but it is believed that the boundary falls within the eastern half of said townships. No entry should be allowed for lands in the east half of said townships until a survey of said western boundary has been made, and supplemental plats of said townships have been filed in your respective offices.

Applicants to enter these lands as homesteads must have the qualifications required in the case of ordinary homestead entries under existing law, except that no person who shall at the time be seized in fee

simple of a hundred and sixty acres of land in any State or Territory will be entitled to enter land in Oklahoma Territory. You will, therefore, require the homestead affidavit (form 4-063) to be amended in each case by striking out the words "more than" from the clause "I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory."

Any person applying to enter or file for a homestead will be required first to make affidavit in addition to other requirements that he did not violate the law by entering upon and occupying any portion of the lands described in the President's proclamation dated April 12, 1892, prior to twelve o'clock, noon, central standard time, April 19, 1892, the affidavit to accompany your returns for the entry allowed. Affidavit (form 4-102) modified to meet the circumstances may be used for this purpose.

Information has reached this office from various sources that speculators are preparing for the use of powers of attorney from soldiers to file declaratory statements under section 2304, R. S., on lands opened to settlement by the said proclamation, without any *bona fide* intention on the part of the soldiers to become settlers. Any such proceedings would be fraudulent; you will endeavor to defeat them if attempted, by any means properly within your power. You will advise *bona fide* settlers not to purchase relinquishments of such filings. It is contrary to the letter and spirit of the law to countenance or encourage speculation in any form in connection with the entry and disposal of public land.

There is reason to believe that there will be a multitudinous rush of applicants eager to make entries and settlements on these lands as soon as the period arrives for so doing, and that many devices will be resorted to by the unscrupulous to obtain unfair advantages over others in the competition therefor. The duty will devolve on you to make and enforce such rules and regulations as may be necessary and proper to secure a fair and orderly course of proceedings on the part of all concerned. In so doing, you may provide a method by which you may receive in proper order and act upon in turn the applications to be presented. It is alleged that arrangements have been made by which certain parties will be prepared to take their places in the line of applicants as soon as the lands are opened for making entries, or even before, provided with numerous applications for filing homestead declaratory statements under sections 2304 and 2309, R. S., as agents for parties entitled under the latter section—some are said to have arranged for as many as one thousand each—which they propose to have received and acted upon by you when their turn is reached, before others in line behind them are permitted to make their individual entries. The prospect of this contemplated unfairness has given rise to much indignation and complaint and may lead to disturbances of the peace. I have, therefore, to advise you that it is in your power, in the exercise of the authority and duty of regulation arising out of the necessities of the situation, to

impose a limit on the time and attention which you may accord to any one person who may approach you in his turn under such circumstances. You will accordingly allow any such person to make one entry in his individual character, if he so desires, and to file one declaratory statement in his representative character as agent, if such he shall be, and thereupon require him to step out of the line, giving place to the next person in order, and if desiring to make any other filings, to take his place at the end of the line and await his proper turn before doing so, and thus to proceed in order until all the filings desired by him shall be made, with due regard to the rights of other competitors.

It is also represented that persons have it in contemplation to avail themselves of the mails to present filings in any number at once to the exclusion of persons proposing to present their applications in person. You are advised in reference to this point that filings of homestead declaratory statements under sections 2304 and 2309, R. S., can only be made by the parties entitled, or by their agents in person, and should not be received by mail. This is a ruling of long standing and should be enforced by you in all cases. (See C. L. O., 1, p. 20.)

No difficulty is anticipated from this cause in other classes of claims during the period of anticipated rush of applicants, for the reason that affidavits and applications can not be made and transmitted by mail for homestead entries under the act of May 26, 1890 (26 Stats., 121), without the applicants being personally present in the county in which the lands lie to take the prescribed oaths, which will not be practicable, under the prohibition of entrance upon the lands before the legal opening thereof to settlement.

You are expected to act promptly under the law and instructions before you as cases arise, allowing any parties feeling aggrieved by your action the right of appeal, under the rules of practice, without seeking special instructions from this office in the particular cases, before acting thereon. But should instructions be found deficient in any particular, they will be properly supplemented on application by you.

Very respectfully,

THOS. H. CARTER,
Commissioner.

Approved:

JOHN W. NOBLE, *Secretary.*

RICE v. ALLEN.

Motion for review of departmental decision of March 17, 1894, 18 L. D., 218, denied by Secretary Smith, January 7, 1895.

PAYMENT—EXTENSION OF TIME.

THOMAS P. FINLEY.

An extension of time for payment may be properly granted under the remedial acts of September 30, 1890, and July 26, 1894, where good faith, and compliance with law, are apparent, and failure of crops is shown.

Secretary Smith to the Commissioner of the General Land Office, January 10, 1895. (J. I. H.) (A. E.)

This is an appeal from your office decision of May 19, 1893, rejecting the application of Thomas P. Finley for an extension of time within which to pay for lot No. 1, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 30, T. 3 N., R. 7 E., Rapid City, South Dakota.

Finley filed declaratory statement for the above described land on November 29, 1890, and made proof in March 1893, showing residence from November, 1890, except an absence granted under the act of March 2, 1889. In his proof he showed improvements valued at \$45, and that ten acres had been cultivated. On February 11, 1893, prior to making proof, Finley asked an extension of time for payment of his land. The reason for his application was that his crops failed during the years 1891 and 1892, and as he had a wife and four children to support, had been disabled by sickness, and could not procure employment, he was without means with which to pay for the land. With his affidavit he filed one made by another corroborating this statement.

Your office denied this application, because, in your opinion, Finley could not reasonably have expected to realize sufficient money from 10 acres cultivated to support his family and pay for the land, and, therefore, he could not have been in a position to pay even had no failure of crops occurred. Your office decision, therefore, required him to pay or the land, furnish an affidavit of non-alienation, or forfeit his right to do so on the proof submitted, subject to an appeal within sixty days.

From this Finley has appealed to this Department. In his appeal he objects to your office conclusion that he could not reasonably expect even in prosperous seasons to support his family and pay for his land from what he produced on 10 acres.

The joint resolution of September 30, 1890 (26 Stat. 684), provides that:

Whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of Interior, that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

On July 26, 1894 (28 Stat., 123), Congress, recognizing the financial distress existing throughout the country, passed a remedial statute, the second section of which provided:

That the time of making final payments on entries under the pre-emption act is hereby extended for one year from the date when the same becomes due in all cases

where pre-emption entrymen are unable to make final payments from causes which they can not control, evidence of such inability to be subject to the regulations of the Secretary of the Interior.

The proof submitted by Finley showing his good faith and compliance with the law appears satisfactory, and has not been questioned, neither is it denied that there was a failure of crops, as alleged. From this and the fact that there is no evidence in the record to show that had the crops on Finley's land not been a failure, he could not have had sufficient wherewith to support his family and pay less than \$200 for the land, it cannot be seen wherein the relief extended by the remedial acts cited can be denied him.

Your office decision of May 19, 1893, is therefore reversed, and you will allow Finley sixty days after notice within which to make payment for the land.

TIMBER CULTURE ENTRY—SUSPENSION OF PLAT.

OSCAR SASSIN.

A timber culture entry erroneously allowed while the land was suspended from entry may be allowed to stand on the restoration of the land, and the absence of any intervening claim.

Secretary Smith to the Commissioner of the General Land Office, January 10, 1895. (J. I. H.) (J. L.)

I have considered the appeal of Oscar Sassin in the above entitled case, from your office decision of August 8, 1892, holding for cancellation his timber culture entry, No. 754, for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 20, T. 20 S., R. 25 E., New Mexico principal meridian, Las Cruces land district, New Mexico.

Sassin filed his application, and paid his fees on July 10, 1889.

By letter "G", of June 29, 1892, your office notified the local officers that your office, by letter "G", of July 7, 1886, had suspended townships 16, 17, 18, 19 and 20 S. in ranges 24, 25, 26 and 27 E., of the New Mexico meridian, "because of supposed erroneous marking of the public land surveys", and called upon the local officers to report why they had permitted Sassin to make his entry. And on August 8, 1892, your office, by letter "G", of that date, held said entry for cancellation, and allowed Sassin sixty days in which to appeal.

Sassin, in his appeal, alleges in substance: That the local officers, by accepting his application, deprived him of the right to make timber culture entry elsewhere, and put him to the expense of complying in good faith, for three years, with the timber culture laws: That there was no erroneous marking of the public land surveys, as supposed, and that the suspension aforesaid was erroneous, and should be revoked.

It now appears, that by your office letter "E", of July 12, 1893, the townships aforesaid were "relieved from said suspension, the causes which led to the same having been satisfactorily adjusted by this (your) office."

Under the circumstances, I think that Sassin's entry should be allowed to stand. Although the entry was erroneously allowed, there exists no longer any legal reason why it should now be denied, in the absence of any intervening adverse claim. In the exercise of the supervisory power vested in this Department, I set aside your office decision of August 8, 1892, and direct that Sassin's entry be held intact, and that he be permitted to perfect the same by final proof, or by purchase under the timber culture laws.

JOSEPH CRAWFORD.

Motion for review of departmental decision of June 18, 1894, 18 L. D. 553, denied by Secretary Smith, January 10, 1895.

CONTEST—CHARGE—APPLICATION TO ENTER.

PARKER ET AL. *v.* LYNCH.

A contest affidavit based upon information and belief, and corroborated by statements showing no specific knowledge of the facts alleged, may be properly regarded as not affording a basis for a hearing.

The enforcement of contracts between claimants for public land is not properly within the scope of contests before the Land Department.

A homestead entry allowed on papers executed prior to the time when the land is open to entry may be amended by supplying a proper affidavit, or the defect treated as cured, in the absence of any adverse claim, by the subsequent allowance of a commuted cash entry thereof for townsite purposes, and payment thereon.

Secretary Smith to the Commissioner of the General Land Office, January 11, 1895. (J. I. H.) (E. F. B.)

By your office letter of December 17, 1894, you transmitted to the Department two motions, one by John W. Parker, and the other by J. S. Walton, for review of its decision of November 30, 1894, 19 L. D., 384, in the matter of the application of James W. Lynch to commute for townsite purposes his homestead entry for the SW. $\frac{1}{4}$ of Sec. 27, T. 26 N., R. 2 E., Perry land district, Oklahoma Territory.

You also transmitted, for consideration in connection with said motions, a petition of a number of persons, making charges against the homestead entry of Lynch, in which they alleged that they were settlers on the lands covered thereby, as occupants of the townsite of Ponca City, and that they intended to enter the land embraced in said entry.

This case came before the Department originally upon the application of said James W. Lynch to commute his homestead entry for the land described, for townsite purposes, under the 22d section of the act of May 2, 1890 (26 Stat., 81), which application was transmitted by your office letter of July 7, 1894, together with triplicate plats of survey, the final proof, and other papers in the case. In said letter you recommended that Lynch's commutation proof be accepted, and that his application to purchase said tract at ten dollars per acre be allowed.

The receipt of the disbursing clerk of this Department for a draft for fifteen hundred dollars (\$1500) tendered by Lynch in payment for the land accompanied said application.

An examination of Lynch's final proof showed that he was entitled to purchase said land, and as the draft for the sum above named had been collected, you were directed to issue to Lynch a patent for the one hundred and fifty acres embraced in said entry.

While Lynch's application was pending before your office, the local officers forwarded an application by John W. Parker to contest said entry, in which he charged fraud on the part of Lynch, in making his homestead entry. The affidavit stated that he had

no sufficient personal knowledge as to the facts alleged, and the charges made, so as to warrant him in making a positive oath as to the truth thereof, and that he was not able to secure a corroborating witness thereto, and that he believes that such facts were only within the personal knowledge of the entryman and his personal friends and persons controlled by them, and difficult to establish by voluntary testimony.

This affidavit of Parker, not being corroborated, was rejected by your office; and there being no error in such rejection, it was not deemed by the Department sufficient to warrant further consideration.

After the decision of the Department directing the issuance of patent upon Lynch's entry, the attorneys for Parker filed in your office a petition, with the affidavit of Parker attached, charging fraud in the entry of Lynch, the substance of said charge being this: that said entry was fraudulent in its inception, and wholly void, for the reason that the application and affidavit upon which the entry was allowed was not made before the register and receiver, but that, prior to the hour of noon, central standard time, September 16, 1893, said Lynch executed in Arkansas City, before B. N. Woodson, who assumed to be probate judge of county K., Oklahoma Territory, his homestead affidavit; and that he did procure and conspire with one David Pryor, the agent of Lynch, to enter within the limits of the lands opened to settlement, prior to the hour of twelve o'clock, noon, of September 16, 1893, and did send a special messenger with said affidavit and his homestead application to enter the land in controversy, accompanied by the legal fees and commissions, to the register and receiver of the United States land office at Perry, Oklahoma Territory; that by such fraudulent methods and agencies the homestead entry of Lynch was procured, and he was thereby enabled to secure a great and undue advantage over other claimants, who strictly observed the law, and who did not in person or by agents enter within the limits of said Territory.

The affidavit of Parker was accompanied by an affidavit made by George Worth, who states

that he has read the statement made in the enclosed copy of the affidavit of John W. Parker, forwarded to the Honorable Secretary, and is acquainted with the contents thereof, and he knows the statements made therein concerning the homestead application and the alleged disqualification of Lynch to enter the SW. $\frac{1}{4}$ of Sec. 27, T. 26 N., R. 2 E., are true.

In passing upon this allegation the Department, in its decision of November 30, 1894, stated that Parker's petition to be allowed to contest the entry, "is verified by his affidavit, but is without corroborating witnesses." It was held that as Parker's affidavit was upon information and belief, and Worth's corroborating affidavit was of the most general character, not even a single fact being stated within his knowledge which would support any of the charges, that there was at this stage of the proceeding no sufficient reason shown for allowing so irregular a contest.

I have carefully considered the question presented by the motion for review filed by Parker, and I now see no reason for disturbing the decision of the Department heretofore rendered upon that question.

The application of Walton to be allowed to contest this entry should be rejected, for the reason that, while Walton alleged that he was a prior settler upon the land, it is shown that he entered into a contract with Lynch by which he (Walton) agreed to relinquish his claim for a consideration of two thousand dollars, and the only ground upon which he now bases his protest is that he was induced to execute said relinquishment by false and fraudulent representations of Lynch. It appears, however, that his only complaint is that Lynch, after paying a portion of the consideration, has refused to carry out the contract by paying the balance. I can not see that the Department is under any obligation to lend its aid in enforcing a contract made between Walton and Lynch, or to grant to Walton any relief under these circumstances.

The petition of certain alleged settlers, forwarded by A. C. Foy, alleging that they are now occupants of the townsite of Ponca City, and intend to enter the land embraced in their settlement, presents no sufficient reason why any action should be taken by the Department in their behalf, it not being shown or alleged that they were prior occupants of the land in controversy. I must therefore hold that these petitioners have no standing as adverse claimants, and there is no reason why the entry of Lynch should be canceled, so far as it affects any right they may have. I must therefore consider the question as if it were an *ex parte* matter, pending solely between Lynch and the government.

The only question necessary for the Department to consider is whether it is shown by the record in the case that the entry of Lynch was fraudulent and absolutely void, and whether it should be canceled upon the facts shown by the record, irrespective of the rights of others.

It appears that in the month of August, 1884, the entry of Lynch was under investigation by J. W. Witten, an agent of your office, who, on August 18th, reported as follows:

At about 2 o'clock, A. M., on Sept. 16, 1893, the day of the "opening," Lynch with ten or eleven other men desiring to make homestead entries, started from Arkansas City in two hacks, driven by Frank Briggs, now of Fort Smith, Ark., and Seward

Hubbard, of Arkansas City, to a point on the north line of the Outlet country. They took with them B. N. Woodson, then and now probate judge of K. county, and when they arrived at the line, they passed over on to the "one hundred foot strip," within K. county, where Judge Woodson swore them, and they executed the necessary affidavits in support of their applications to enter lands under the homestead laws. This all occurred long before daylight, and the said applications and affidavits were then delivered to one David A. Prior, now of Perry, O. T., who took them across the country to Red Rock, a distance of thirty-five or forty miles, where he bought special delivery stamps from the postmaster, J. H. Snell, still of Red Rock. The applications were then carried on to Perry, over land, a distance of about fourteen miles, where they were deposited in the post office, with the special delivery stamps attached, in time to be delivered by the postmaster at Perry to the register of the Perry office at 1:20 P. M., or nearly two hours before the first mail could have arrived from K. county.

Judge Woodson entered the Territory at 12 o'clock, noon, in company with C. H. Cameron, now of K. county, who will swear that he was with Woodson at all times from 11 A. M. until 3 P. M. of that day, and no affidavits were executed before him during that time.

If these facts are true, and I believe they are, is not Lynch guilty of violating the law?

It appears from the record that Lynch has filed an affidavit in this case, in which he admits the fact that he, with others, after having consulted legal authority, and being informed that it was lawful to do so, executed their affidavits after ten o'clock P. M. of September 15, 1894, and engaged a man to carry their applications to the post office at Arkansas City, and there mail them, so that they would go to the land office by the first mail; that he delivered his application to be mailed, as he then understood it would be, at Arkansas City; that he did not know until several months afterward that it reached the land office by a different route, the plan and method of conveying it having been changed, without his direction, knowledge, or consent; that he has paid off and satisfied every adverse claimant to the land on which he made his filing, except Parker, who filed his contest or protest long afterward, to wit, on April 19, 1894. He also files the affidavit of David C. Pryor, the person to whom Lynch entrusted his application for mailing, who states that on the 15th of September, 1893, he agreed with said Lynch and other persons to convey their applications for filing to the nearest post office, and mail them to the register and receiver at Perry, Oklahoma; that at the time of making said agreement he had an arrangement to have said applications mailed at Arkansas City, in the State of Kansas; but that, learning later that the mail from Arkansas City would be delayed, he, without authority from Lynch, carried his application to the Red Rock post office and there attempted to get the postmaster to carry and deliver the same, under special delivery stamp to the post office at Perry; that, failing in this, he carried the applications to Perry in person, and delivered the same to the postmaster. He asserts that this conduct on his part was taken without informing Lynch that he intended to do so, and without Lynch's knowledge, so far as he is aware.

There is no testimony filed with the record that in any manner contradicts or impeaches the testimony of Lynch and Prior, that Prior's entrance into the Territory was without the knowledge or consent of Lynch, and that it was contrary to his purpose and instruction. So the only question to be considered by the Department now is, whether the execution of the affidavits and application prior to the date of the opening would render the entry of Lynch absolutely void, and is of itself sufficient, at this stage of the case, to require the cancellation of his entry.

It is contended by counsel that the ruling of the Department in the case of *Smith v. Malone*, 18 L. D., 482, is conclusive of the question herein presented, and that the entry of Lynch is therefore absolutely void. If the entry of Lynch, made upon an affidavit executed before the land was open to settlement or entry, is absolutely void, then it should be canceled, without regard to the asserted rights of the petitioners, but if it is merely voidable, there is no reason why it should not be passed to patent, in the absence of any adverse claim that could be rightfully asserted against it, there being no legal contest against the entry when it was allowed, and the money having been paid and covered into the Treasury.

In the case of *Smith v. Malone*, *supra*, it was held that an entry made at a time when the land was not subject to entry would be a nullity, and that the application and papers on which it was made would be likewise null and void and of no effect, because they were made for the purpose of initiating a right which if acquired would relate back to the date of initiation and cut off intervening claims. But there is this distinction between the two cases. In the case of *Smith v. Malone* the application was not allowed, and the question presented was whether the claimants could acquire any right under an application upon which no entry had been allowed. In the case at bar the entry was not made when the land was not subject to entry, but after it was opened to entry, although upon papers executed prior to such date. This was an amendable defect which could be cured by amendment by supplying a proper affidavit, which would not, however, affect the rights of any intervening or adverse claim initiated prior to such amendment, and such defect was cured by the allowance of final entry and payment of money prior to the initiation of any adverse claim.

This appearing to be the only defect in the entry of Lynch, I must hold that it is not absolutely void, and that there is no reason why it should not be passed to patent.

The motion for review is denied.

EVIDENCE—CONTINUANCE—RULE 35 OF PRACTICE.

TONSFELDT v. MCKEEVER.

Where, in proceedings under Rule 35 of Practice, one of the parties is in default, and the commissioner subsequently declines to receive the testimony on behalf of said party, the local office may, on proper showing, at the final hearing, allow said party an opportunity to submit his testimony, and continue the case for such purpose.

In case of an order for such purpose it is not error for the local office to designate an officer before whom the testimony shall be taken different from that one named in the original notice.

Secretary Smith to the Commissioner of the General Land Office, January 12, 1895.
(J. I. H.) (E. W.)

The plaintiff appeals from your office decision of August 1, 1893, affirming that of the local officers, holding defendant's homestead entry intact, and dismissing plaintiff's contest.

On the 17th of October, 1891, defendant made homestead entry of the, NE. $\frac{1}{4}$, Sec. 13, T. 34, R. 15 W., O'Neill land district, Nebraska, and on the 18th of August, 1892, plaintiff initiated contest against the same upon the ground that said defendant

has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law.

The questions presented by the appeal of the plaintiff, in which he has clearly and concisely designated the errors of which he complains, do not go to the merits of the case, but simply involve the rules of practice observed by the Department. They are set out in the second and third grounds of said appeal as follows:

Second.—Erred in affirming the decision of the honorable register and receiver in continuing said contest on November 12, 1892, whereas they at that time, denied said application as more fully appears from the annexed affidavits of counsel for both parties, acting as such counsel on that day.

Third.—Erred in holding that the continuance of said case upon the showing made, and citing the parties to appear for further hearing before another officer and at a different time and place other than designated in the original notice of contest, was lawful and in accordance with the rules of practice.

In order to disclose the relevancy of the questions thus presented, it is necessary to state that in accordance with the provisions of rule 35 of practice, the local officers had directed the oral testimony to be taken before a notary public, designated by them. At the hour set for said hearing the defendant was not present, but did appear with her witnesses later in the day, after plaintiff's testimony had been taken, and asked to have her witnesses sworn, alleging that for various reasons it was impossible to reach the place of hearing sooner. Her application being denied, she renewed her showing on the day set for final hearing before the local officers and asked for a continuance. The record discloses that her request was granted and a day set for taking oral testimony before an officer different from the one designated for the original hearing.

"The annexed affidavits of counsel" referred to in the second ground of the appeal, were not in existence at the date of your office decision, but were subsequently made in support of the said appeal; moreover the record of the case discloses the fact that the application of defendant for continuance was granted on the 12th of November, 1892, the day which had been fixed for final hearing.

The affidavits of counsel made subsequent to the date of your office decision, and filed in support of the grounds of appeal, will not be considered in so far as they go to impeach the record in the case.

The third ground of error sets up the complaint that it was contrary to the rules of practice for the local office to order a further hearing for the purpose of taking oral testimony before an officer different from that one designated in the original notice of contest.

This action of the local officers was not inconsistent with the rules of practice, in view of which I concur in the conclusion reached by your office, which is therefore affirmed.

INDIAN LANDS—ALLOTMENT—RELINQUISHMENT.

CHARLES W. DANIELSON.

An application to relinquish an allotment, and make homestead entry of other land, on the ground that the applicant is a citizen of the United States and hence not entitled to an allotment, will not be allowed, where, from the circumstances surrounding the case, the application suggests an attempted sale of the tract allotted, and diligence in the matter of correcting the alleged mistake does not appear.

Secretary Smith to the Commissioner of the General Land Office, January 12, 1895. (J. I. H.) (C. W. P.)

I am in receipt of your letter of March 15, 1894, transmitting a paper purporting to be a relinquishment by Charles W. Danielson, of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 9, T. 58 N., R. 19 W., Duluth land district, Minnesota, embraced in his allotment No. 42, under the fourth section of the act of February 8, 1887, (24 Stat., 388); also his homestead final proof of certain other lands in Minnesota.

Accompanying the above, is a copy of a letter from Mr. P. H. Seymour, attorney for Fred. A. Gross and Augustine Grochan.

June 28, 1892, allotments were duly made to said Danielson and his children, in accordance with the provisions of the fourth section of the said act of February 8, 1887, and the circular issued by the Department September 17, 1887. But no patent appears to have been issued under this allotment, and Charles W. Danielson now applies to the Department to allow him to relinquish said allotment, and to make homestead entry of other lands in Minnesota, on the ground that his father is a white man, and a citizen of the United States, and his mother a half-blood Indian. Where his parents lived, whether with the Indians as

members of some tribe, or among the whites as citizens of the United States, is not shown.

Why the patent was not issued to this allottee, in conformity with the instructions contained in said letter of the Secretary of the Interior, of June 28, 1892, does not appear.

The fifth section of said allotment act declares

that the United States does, and will, hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, etc.: Provided . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

The circular of September 17, 1887, relating to allotments under said act of 1887, directs that Indian women married to white men, or to other persons not entitled to the benefits of this act, will be regarded as heads of families. The husbands of such Indian women are not entitled to allotments, *but their children are*. Doubt is thrown on this rule by the decision of the Department in the case of *Black Tomahawk v. Waldron* (13 L. D., 683). But now, after so long a time has elapsed since the allotment was approved by the Department, and there is nothing left to be done but the merely ministerial act of issuing the patent, I cannot think that the Department should sanction a relinquishment, even if it should be conceded that the allottee was not entitled to the allotment, under the ruling in the case of *Black Tomahawk v. Waldron, supra*.

The circumstances surrounding this case—the fact that the same individual, who applied to contest Danielson's allotment when it was before the Department for approval, and who was then denied the right to do so, is now seeking to make homestead entry of the tract, raising a strong suspicion that the application to relinquish is but a cover for a sale of the tract to him, and the laches of Danielson in making application to correct the mistake, if it exists,—do not commend it to favorable consideration.

The act of February 8, 1887, was considered by Attorney-General Garland, in a letter to the Secretary of the Interior, dated January 26, 1889, (19 Op. Att's-Gen'l, p. 232), and the opinion was expressed that an Indian allottee of land under this act, does not even possess the right to cut and sell timber standing upon the land, except such as may be necessary for him to cut in clearing the land, for grazing or agricultural purposes, or to erect suitable buildings on the land, during the period of twenty-five years, for which the land is held in trust for the benefit of the allottee, and in case of his death, of his heirs, according to the laws of the State or Territory where the land is located.

The application of Mr. Danielson to make homestead entry of other lands in Minnesota, cannot now be considered.

The application of Mr. Danielson to relinquish, is therefore denied.

LEAVE OF ABSENCE—CASUALTY.

JOHN RILEY.

Failure of a settler to get water on his land cannot be regarded as a "casualty," within the meaning of the act of March 2, 1889, and hence furnishing a proper basis for a leave of absence under section 3 of said act.

Secretary Smith to the Commissioner of the General Land Office, January
(J. I. H.) 12, 1895. (G. C. R.)

On March 7, 1893, John Riley made homestead entry No. 10,206, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 8, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 10 S., R. 1 W., Salt Lake City, Utah. On April 30, 1894, he filed an application in the local office for a leave of absence for one year, under section 3 of the act of March 2, 1889, 25 Stat., 854; the same was sworn to and duly corroborated. To support his application he set forth the following facts:

In the month of June following the date of entry (March 7, 1893,) he built a substantial dwelling house on the land, expecting to move his family to it within a short time; that he made the entry in good faith to secure a home for himself and family; that prior to building the house he commenced to bore for an artesian well, expecting that water would thereby be readily secured, and that he could move to the land within the time allowed by law; he failed, however, to reach water, notwithstanding his diligent efforts; that he expended more than \$280 on the well, and was still continuing to sink it at date of application for leave; that the land is "sage brush land," totally worthless without water, and that it is his intention to prosecute the work until water is obtained; that there is no water within two miles of the land, and it is impossible to reside upon it in its present condition; that if leave of absence be granted him for one year, he will be able within that time to save enough money out of his limited means to carry the well to such depth as to insure ample supply of water for domestic and irrigation purposes, thus rendering the land valuable; that he can not secure a support for himself and family by reason of the desert character of the land; he therefore asked a year's leave of absence.

The register and receiver denied his application (July 20, 1894,) on the grounds that "claimant has not established residence upon the tract."

On appeal, your office by decision dated August 27, 1894, affirmed that action, on the grounds that "Riley had not, at the date of his application, settled upon the tract entered, and, consequently, he does not come within the provisions of said section."

A further appeal brings the case here.

The 3d section of the act of March 2, 1889 (supra), provides:

That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may

prescribe, that any settler upon the public domain under existing law is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such a settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

Admitting that Riley was a settler upon the land at date of his application, yet I think the showing made does not authorize the leave asked for. He does not allege failure of crops, either total or partial, as the basis for his application; neither does he allege sickness; the only other grounds mentioned in the statute is "other unavoidable casualty." His failure to get water on the land, however earnest his efforts to do so, can not be regarded as a "casualty" within the meaning of the statute. A casualty is "that which happens without being foreseen; accident, chance, contingency" (Worcester). "That which comes without design or without being foreseen; an event inevitable, and not to be guarded against" (Webster). He simply failed, after an earnest effort, to succeed in a laudable enterprise. His failure may be a misfortune; it can not be regarded as a positive event coming without design and not to be guarded against, and therefore it is not a casualty.

Having failed to present such facts as would warrant the favorable consideration of his application under the terms of the statute, leave of absence can not be granted.

The decision appealed from is therefore affirmed.

RAILROAD SELECTIONS—COST OF SURVEYING AND CONVEYING.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

In all cases where a railroad grant is made directly to a company, or to a State in trust for a designated company, the cost of surveying and conveying the lands so granted must be paid into the U. S. Treasury before said lands are conveyed to such company.

Secretary Smith to the Commissioner of the General Land Office, January, 18, 1895. (J. I. H.) (F. W. C.)

With your office letter of October 17, 1894, was submitted for my approval clear list No. 2, of selections by the St. Paul, Minneapolis and Manitoba Railway company, under the provisions of the act of August 5, 1892 (27 Stat., 390).

Upon said list is a memorandum: "No surveying or office fees required."

By the act of July 31, 1876 (19 Stat., 121), it was provided:

That before any land granted to any railroad company by the United States shall be conveyed to such company, or any person entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law

from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company of persons in interest.

Upon inquiry at your office, it is learned that this company has never been required to pay the costs of surveying and conveyance where applying for the patenting of any of the lands claimed under its grants.

Circular "F" of November 7, 1879 (6 C. L. O., 141), under heading "VI., cost of surveying and conveying lands," after referring to the act of July 31, 1876 (*supra*), holds as follows:

The provisions of the said act are construed as not applying to grants made to States to aid in the construction of railroads not named in the granting act; but where the grant is to a State in trust for the benefit of a company named—where the State is simply an intermediary and not a beneficiary—the payment required must be made.

The first grant claimed by this company was made by the act of March 3, 1857 (11 Stat., 195), to the then Territory of Minnesota.

This grant was enlarged by the act of March 3, 1865 (13 Stat., 526).

It is unnecessary to trace the several claimants under the legislation of the Territory, and afterward State, until it became known as the St. Paul and Pacific Railroad company.

By the act of March 3, 1871 (16 Stat., 588), Congress recognized the legislation of the State and granted to the St. Paul and Pacific railroad company the right to change its several branch lines with the same proportionate grant as made by the acts of 1857 and 1865, and the grant made by this act of 1871 has been held to be a new grant. For a history of this grant see case of St. Paul and Pacific railroad company *v.* Northern Pacific railroad company (139 U. S., 1).

It is for losses along one of the modified or changed branch lines, viz., the St. Vincent Extension; that the lands comprising the list under consideration are selected.

It is therefore clear to my mind that this is land granted to a railroad company by the United States, within the meaning of the act of 1876 and the construction of said act as made in the circular referred to, and I have therefore to direct that the company be called upon to pay the costs of surveying and conveying the lands included in this list, before a consideration of the list upon its merits is given.

TIMBER LAND CLAIM—BURDEN OF PROOF—ALIENATION.

PEASLEY *v.* WHITING.

The burden of proof that rests upon a timber land claimant, in case of a protest against his right of purchase, requires at his hands an affirmative showing that the land is of the character contemplated by the act, and unoccupied, uninhabited and unimproved; but does not require of him to show that none of the neighboring settlers are making claim to the land, when their actual settlements are in other quarter sections, and no improvements have been made on the quarter section claimed by him.

The sale of a timber land claim after the acceptance of final proof and prior to the issuance of final certificate does not in itself warrant an attack on the entry.

*Secretary Smith to the Commissioner of the General Land Office, Jan-
(J. I. H.) uary 19, 1895. (E. M. R.)*

This case involves the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 20, T. 18 N., R. 3 W., Olympia land district, Washington.

The record shows that Clarence L. Whiting's timber land application for the above described tract, with other land, was allowed on August 12, 1890.

On August 18, Emerson D. Peasley's, homestead application for the above, together with other lands, was accepted.

Upon Whiting publishing his intention to make final proof Peasley filed his protest against its allowance for the land in controversy, alleging, among other things: first, that the land is more valuable for agricultural purposes than for timber; second, that he had settled and established a residence upon the land on July 4, 1890.

This Department on August 19, 1893, reversed the decision of your office and directed the acceptance of Whiting's final proof.

Upon April 5, 1894, the question being before the Department upon motion for review, it was held that the proposition of law contained in the former decision of the Department, that the burden of proof was upon the contestant or protestant Peasley, was erroneous, and that the burden of proof was upon Whiting, the timber-land claimant; but added that inasmuch as the evidence shows that Peasley's settlement and improvement were upon a different quarter-section from the land in controversy, and as there was no evidence of settlement upon the land, the notice given by the settlement of Peasley extended only to the technical quarter-section upon which he actually made settlement, and therefore affirmed the former decision of the Department.

Upon a motion for re-review, the case is again under consideration, counsel for Peasley urging that this Department was in error in raising the question of the doctrine in *Pooler v. Johnson* (13 L. D., 134), inasmuch as that question had not been raised before the local office, before your office, or this Department, until the motion for review was under consideration.

It is urged that Whiting had actual knowledge that Peasley was claiming the land in issue, and that such positive knowledge was as efficacious in law as a remedy for the protection of the settler, as the notice given by settlement upon a quarter-section, and a rehearing is asked in order that the petitioner may substantiate the truth of this latter allegation.

While it is true that the burden of proof rests not upon the contestant but upon the timber claimant, I do not think that question can affect the determination heretofore made in this case by the Department.

The effect of that rule was to compel the timber claimant to affirmatively present that state of facts which complied with the requirements of the act of June 3, 1878, or to be more specific in reference to the question now at issue, it became his duty to show that the land he was seeking to purchase was unoccupied, uninhabited and unimproved.

This he appears to have done, the evidence showing that there was no settlement or improvement on the land claimed by him. Can it be successfully urged that the burden of proof imposed any heavier duty upon him? Is it a tenable ground to take, that in addition to this showing, the timber-land claimant has to go further and show that none of the neighboring settlers are making any claim to the land that he has made application for, when their actual settlements are in different quarter-sections and no acts of improvement have been made upon the land or the quarter-section claimed by him?

To so hold, would be to impose a grievous burden upon the timber claimant, neither contemplated by the law nor necessitated by the holdings of this Department.

When the timber claimant made the affirmative showing that he had complied with the requirements of the law, it then became the duty of the contestant to show those facts which he now alleges to be true.

It can not be a matter of surprise to the agricultural claimant that this question has been raised. It was of the essence of the suit at its inception. It was a question that was fully before the local officers and should have been combated there by the contestant, and having failed so to do, it can not be raised now.

It is not a matter of newly discovered evidence. The contestant alleged settlement rights prior to the application to purchase by the timber claimant. The evidence at the hearing shows that there was no settlement or improvements upon the land in controversy, and if, as a matter of fact, the timber claimant had actual knowledge that the agricultural claimant claimed any right to the land, the latter should have offered proof of such knowledge.

Subsequent to the commencement of the consideration of this case additional affidavits have been filed. It is further alleged that on April 29, 1893, the Puget Mill company entered into an agreement with Mosher and Macdonald, in which the said company set forth that it had an inter-

est, in but had not yet secured a perfect title to, the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of Sec. 20, T. 8. N., R. 3 W., in Thurston county, Washington, and that if it perfected title within three years from date of the contract it would sell and convey to the said parties the above described tract, and it is urged now that, if given an opportunity to do so, the petitioner will be able to prove that the entry was fraudulent upon the part of Whiting, and that it was entered for the use of the said company, and that Whiting had no *bona fide* interest in the tract in dispute.

It does not appear that the Puget Mill company has received its interest from Whiting, any more than it appears that they received it from Peasley. In this case Whiting's final proof had been accepted by the Department, and while no certificate has issued, it leaves me of opinion that he had a right to sell, and that even if it should be shown that the interest of the Puget Mill company was secured from the timber-land claimant, I see no reason in law why a rehearing should be granted as he would after the acceptance of final proof have the right to sell.

It is contended further that the entry of Whiting was improperly allowed, but inasmuch as it has been allowed, I do not think this question should be considered in a motion for re-review, when it does not appear from the decision in review that it was raised then.

In contravention of the rule in reference to re-reviews, I have considered this case at some length, as I think a discussion of the effect of the burden of proof not inapt, especially in view of the fact that there seems to be some confusion in the decisions as to its extent and weight.

The motion is denied.

RAILROAD GRANT—MINERAL LANDS—PROTEST.

ZADIG ET AL. v. CENTRAL PACIFIC R. R. CO. ET AL.

Pending protest proceedings, in which a general charge is made that certain lands claimed under a railroad grant are in fact mineral in character, will not defeat the right of a mineral claimant, who sets up a specific claim, to be subsequently heard on a similar allegation as to the character of the land in the event that the first proceedings fail.

Secretary Smith to the Commissioner of the General Land Office, January 19, 1895. (J. I. H.) (F. W. C.)

I have considered the appeal filed by H. Zadig *et al.* from your office decision of January 6, 1893, denying his application for a hearing to determine the character of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of Sec. 5, T. 13 N., R. 10 E., M. D. M., Sacramento, California.

This land is a part of an odd-numbered section within the limits of the grant to the Central Pacific Railroad company and was embraced in its lists Nos. 3 and 6, filed July 26, 1882, and July 29, 1884, respectively.

On November 12, 1890, Herman Zadig *et al.*, claiming to be the owners of the Annex Placer claim covering the land in question, filed a protest against the issue of a patent for this land, on account of the grant for said company, in which it was alleged that the same contained valuable deposits of mineral and for this reason was excepted from the grant for said company, and petitioned for a hearing in order to establish the character of the same.

Prior to the filing of said protest, to wit, on November 4, 1889, your office upon the application of one Wm. Muir, had ordered a hearing in order to determine the character of certain lands selected by said company, alleged to be mineral, among which were the lands in question.

It appears that this hearing was pending at the time of the filing of Zadig's protest, and, for that reason, your office letter of December 8, 1890, suspending Zadig's protest and petition for a hearing, to await the result of the hearing upon the protest by Muir.

On September 22, 1891, the local officers found in favor of the railroad company upon the record made at said hearing, holding that the lands were chiefly valuable for agricultural purposes, and upon appeal, your office decision of July 16, 1892, sustained the finding of the local officers.

From this decision Muir failed to appeal, and after closing that case your office letter of July 6, 1893, as before stated, dismissed the petition by Zadig *et al.*, on the ground that a thorough investigation as to the character of these lands had been had on Muir's application and the lands adjudged to be non-mineral in character.

Zadig filed a motion for a review, which was denied by your office letter of June 13, 1893, and he thereupon appealed to this Department.

The sole question for consideration as presented by this record is whether the proceedings had upon the application of Muir should be held to bar a further investigation upon the application by Zadig *et al.*, in which the charge is substantially the same as that made by Muir.

From a review of the matter I am of the opinion that the proceedings had in the case arising upon the protest by Muir, should not be held to bar a further investigation upon the application by Zadig *et al.*

While it is true that the general charge is the same, yet it must be remembered that Zadig *et al.* alleged a specific claim to the tract in question and their application for a hearing having been filed during the pendency of the proceedings upon Muir's protest, they should have been permitted to intervene in said case, instead of suspending their application to await the result thereof.

While there may have been no fraud or collusion in the matter of the proceedings had upon Muir's protest, which was of a general nature and embraced a large body of land, yet I do not think the proceedings had upon said application should be held to deprive the present applicants of a right to make a showing in support of their specific claim as a placer location of the tract in question, which is alleged to have been located in 1887 in conformity with the laws of

Congress and the local mining regulations and customs in force and observed in the mineral district within which the same is located, and that petitioners have kept up and maintained their claim thus initiated by the expenditure of not less than \$100 each calendar year.

It is further stated in your office decision upon the motion for review—"It is nowhere stated positively that any gold has ever been taken from the lands in question."

This land was returned by the surveyor as mineral land and the affidavits of experienced parties filed in support of the application tend strongly to establish the return of the surveyor. Further; it is alleged that it is "deep mining" and that some time will be necessary to a full development of the claim; that these parties were engaged in the development of the claim and were prevented from continuing the same by reason of the proceedings, heretofore had, involving the character of the land.

While it is true that a location can not be legally made without proof of discovery, yet as this tract was returned as mineral, and the surrounding lands have been patented as mineral lands, upon a careful consideration of the showing made I am of the opinion that the appellants are entitled to a hearing upon their petition, and have, therefore, to direct that the local officers be instructed to order the same.

Aside from the rights of the appellants, under the decision of the supreme court it becomes the duty of the Secretary of the Interior in the administration of this grant to determine whether the lands falling within the limits of the grant are of the character contemplated by the grant. That all mineral lands are excepted from this grant will not be questioned, and the decision of the Secretary is a finality as to the character of the land.

In view of the showing made in support of this application it is deemed advisable to direct the hearing, to the end that this Department may have before it all obtainable light in the matter of the character of this land, as a guide when its lists are taken up for approval.

FRAUDULENT SURVEY—MEANDER LINE OF LAKE.

G. A. BURNS ET AL.

A hearing may be ordered, with a view to a resurvey of the boundaries of a lake, on a showing made that the original meander line did not in fact conform to the shore line of said lake, but fraudulently excluded from said survey a large amount of valuable government land.

Secretary Smith to the Commissioner of the General Land Office, January 19, 1895. (J. I. H.) (P. J. C.)

This is an application by G. A. Burns and six others, who allege that they are actual settlers upon a tract of unsurveyed land belonging to the United States and included in sections 2, 3, 4, 9, 10 and 11, in township 57, range 17 west, 4th p.m., Minnesota, which tract was either

fraudulently or by error included in the meander of Cedar Island Lake, called also Ely Lake, located in said sections and represented in the official plat of such survey to be a part of said lake covered by its waters, and they request that the tract may be surveyed, that they may procure title thereto. It is also suggested by counsel in their brief that a hearing be ordered for the purpose of determining the facts alleged.

Your office, by letter of October 6, 1893, denied the petition, whereupon the petitioners prosecute this appeal, assigning error as follows—

1. In holding that the lands involved in this appeal have been conveyed by government.

2. In holding that the rule announced in *Mitchell v. Smale*, 140 U. S., 413, governs the decision in this case, as the lands here involved are no part of a former lake bed.

3. In denying the petition on the ground that no evidence was produced that the outlet of Cedar Island Lake was not dammed at the time of the government survey in 1876.

4. In holding that the application is one to place the petitioners in possession of lands *outside* of official meander lines of Cedar Island Lake.

5. In holding that an order for a survey of the lands in question, or a hearing to establish the truth of the matters set up in the affidavits, would be a cause of vexatious litigation which ought not to be created or sanctioned.

6. In disallowing any relief to the petitioners under their application.

7. In denying petitioners such relief under their application as will give them a standing in court to determine adverse claims, if any, to the lands in question.

8. If the order appealed from be a discretionary order, the Commissioner erred in disallowing the application, because such disallowance was an abuse of discretion.

The survey of this township was made by H. E. Howe, United States deputy surveyor, in 1876; approved by the surveyor-general August 7, 1876.

A similar application was made by the same parties through the surveyor-general of Minnesota in May, 1892; that was also rejected by your office letter of October 7, 1892.

The surveyor-general in transmitting this petition, says—

A great deal of complaint has come to this office in regard to the survey of this town, especially this portion of it, and I find by referring to the files of the office, it is no new matter.

The plat was transmitted to your office April 12, 1879, by Hon. J. H. Baker. On April 18, 1879, Hon. J. H. Stewart in a letter addressed to the Hon. Commissioner, asked that action be suspended in approving survey until affidavits could be forwarded. * * *

On June 2, 1879, an affidavit of John McGuire and letters of F. H. Pressnell, receiver, were forwarded and in this letter Surveyor-General Stewart withdrew his objections to the approval of the survey, but requested that an examination of said survey be made. This request was denied by the Hon. Commissioner in his letter E to this office of June 11, 1879. I find no record in this office of the formal approval of this survey.

There are quite a number of affidavits presented by the petitioners outside of their own, some of them accompanied with plats of the land and lake, which were made by surveyors and engineers, woodsmen

and others familiar with the surrounding country, and skilled in tracing lines of government surveys and meanderings. I have carefully examined all these, and find their substance fairly and substantially set forth in counsel's brief, and I cannot do better than quote the same in full, omitting the names of the affiants—

The affidavits show that, instead of covering an area of 1,900 acres, Ely, or Cedar Island Lake is a body of water of about 650 or 700 acres only; that it is a permanent, deep and navigable lake, and in some places running to a depth of sixty-five feet, having high and steep banks entirely surrounding it except at its outlet, rising in places to thirty-five feet above the water, and which are covered with a heavy growth of pine, fir, cedar, birch and other trees; that within the meander lines of said lake, as that line is shown on the government plat of the township, lie 1,202 acres of fine, high, timber-land which has never been a part of the lake, having trees down to the water's edge, of more than four feet in diameter; that in 1878, two years after the alleged government survey by Howe, the character of the lake and its surroundings were just what they are to-day, and, at that time, no monuments, marks or blazings alleged to have been made by Howe could be found by diligent search, and that none of said 1,202 acres of land surrounding the lake was formed by accretion due to receding waters; that a rise of many feet in the level of the lake would, owing to the steep banks, cover no appreciable quantity of land; that the outlet of the lake is the only low land surrounding it, and that, from the nature of the topography of the township to the southward, there could be no rise in the lake; that the entire township south of the lake is lower than the banks of the lake and the land in question, so that if the lake had ever covered the land shown by the Howe survey within the meander line as delineated by him, the whole township would have been submerged and have formed one single lake; that, lying southerly and westerly of Ely Lake, there are five other deep, navigable and permanent lakes, three of which are almost as large as Ely lake, but none of which is shown by the Howe survey; that, at divers times since 1878, careful and systematic search has been made throughout said township 57 for the surveyor's monuments and blazings referred to particularly in the field notes of said Howe, but that, in no instance, has a single monument or marking been found, save on the boundary line of the township, and those were distinct and readily discoverable; that no meander post or marking, either on the line shown on the government plat, or at any other point about Ely lake, exists or has ever been found, though diligently sought after by wholly disinterested parties; that the outlet of the lake is shown by the pretended survey to leave the lake in section 11, and to run southwesterly, leaving the township in the western line of section 31, but, in fact, the outlet leaves the lake in section 2 and runs southeasterly and empties into the Saint Louis river in the southwest corner of section 25; that no such stream as the outlet shown by the Howe survey exists; that some of the section and quarter-section posts established by the field notes of Howe, and said to be blazed on certain described trees, are, in fact, established at points in deep and permanent lakes where water is thirty feet deep; that there has been long known and used by the Indians a canoe-route from the Saint Louis river through the chain of lakes referred to up into Ely lake; that in Ely lake are certain rocky islands, not shown by the Howe survey, rising just above the water and upon which is a heavy growth of pine and other timber which cannot grow in water and which is of an age long antedating the alleged survey of 1878.

It is stated in your said office letter that the records of your office show that the lands in the sections named immediately bordering on the official meanders of the lake have all been disposed of; "mainly to the State of Minnesota, as swamp and overflowed lands." Your office

therefore concluded that the question as to the ownership of the lands between the meander line and the shore line was settled by the supreme court of the United States in *Mitchell v. Smale* (140 U. S., 413; and *Hardin v. Jordan* (id., 401).

The contention of counsel is that the doctrine announced in those cases is not applicable to the one at bar, in that there is no question of riparian ownership here; there has been no recession of the waters of the lake; hence no accretions beyond the meander line, but it is insisted that the land between the meander line and the shore line is not, and never has been, a lake-bed, and by reason of the fraudulent survey, an area of about 1200 acres of land has been included in the lake that is and was actually government land, and subject to homestead entry as such at the time the official map is alleged to have been made; that the rule that attaches accretion or reliction to the riparian title cannot be applied to this case, for the reason that meander lines were not run to and connected with the true shore line, but were so described as to leave a large area between these two points.

I am disposed to think this contention of counsel is sound. The showing made here is amply sufficient, in my judgment, to justify the belief that the survey by Howe was a palpable fraud upon the government; that there was no attempt made to make the meander lines conform to the shore line; and that government land does and did exist at the time the survey was made, reported and approved.

Under these facts, as they appear, I do not think the doctrine of riparian ownership is applicable to the question involved.

(See *Granger v. Swart*, 1 Woodworth's C. C. Rep., 88; *Lammers v. Nissen et al.*, 4 Neb., 245, affirmed by the United States Supreme Court, book 25, Lawyers' Co-op. Ed., 562; *Grim et al. v. Jeffrey*, 75 Iowa, 20; and *Whitney et al. v. The Detroit L. Co.*, 78 Wis., 240.)

It will be observed that in 1878, two years after the survey, there was an entire absence of either meander posts, section or quarter-section corners, or any witness trees at the points called for in the field notes, except on the north and east boundaries of the township. While the *ex parte* statements submitted are not sufficient in themselves to warrant an order for a re-survey, yet they are deemed sufficient to require a hearing to determine whether the physical facts actually exist on the ground, and also to establish the alleged fraud in the survey. This determination renders it unnecessary to discuss at this time any other question suggested.

Your judgment is therefore reversed, and a hearing is ordered. Notice of this hearing should be given to the owners of lots abutting on the meander line of the original survey.

WITHDRAWAL—FOREST LANDS—RESERVATION.

EMMA F. ZUMWALT.

*

An order withdrawing public lands, issued by the Commissioner of the General Land Office, for the purpose of establishing a reservation of forest lands under the act of March 3, 1891, takes effect on the day of its date and excludes all the public lands included therein from other appropriation.

Secretary Smith to the Commissioner of the General Land Office January 19, 1895. (J. I. H.) (J. L.)

I have considered the appeal of Emma F. Zumwalt from your office decision of June 23, 1893, affirming the decision of the local officers, rejecting her application to purchase the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 14, T. 13 S., R. 31 E., M. D. M., Visalia land district, California.

On March 3, 1891, Congress, in the exercise of its power to dispose of the public lands, enacted as follows:

Sec. 24. That the President of the United States may from time to time, set apart and reserve, in any State or Territory having public land bearing forests, any part of the public lands wholly, or in part, covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall, by public proclamation, declare the establishment of such reservation, and the limits thereof. (26 Stat., 1095).

In furtherance of said policy of Congress, the Commissioner of the General Land Office, who is charged by law with the performance of "all executive duties in anywise respecting the public lands", (Section 453, Revised Statutes), on November 5, 1891, by an office order of that date, withdrew from disposal a large number of tracts of land in California, including the tracts now in controversy. And on February 14, 1893, the President, by proclamation, declared the establishment of a public reservation, which embraced said tracts.

On November 5, 1891, the Commissioner, by letter, notified the local officers at Visalia, of said withdrawal, and instructed them to withdraw said lands from disposal; and added the following qualifying words: "Entries already initiated, may be perfected." Said letter was received by the local officers on November 13, 1891.

In the interval, to wit: On November 9, 1891, Emma F. Zumwalt, a resident of the city of Visalia, filed in the local office there, her duplicate sworn statement, declaring her desire to purchase the aforesaid tracts of land, under the provisions of the act of Congress of June 3, 1878, (20 Stat., 89). The register named January 19, 1892, as the day on which she should offer proof, as required by said act, and prepared a notice for publication in a newspaper, and posted a copy in his office.

On January 19, 1892, Zumwalt appeared in person, with her attorney and three witnesses, and offered to make proof, as required by the Statute, and tendered money in payment for the land. Her application (which was put in writing) was refused:

For the reason that the township in which this land is situated, was withdrawn from disposal by Hon. Commissioner's letter "P", of November 5, 1891, which order of withdrawal still remains in force.

From said refusal Zumwalt appealed.

On June 23, 1893, your office affirmed the decision of the local officers; and Zumwalt has appealed to this Department.

She bases her claim upon the proposition, that official notice of the withdrawal of November 5, 1891, was not received by the local officers until November 13, 1891, and that therefore the tracts were not withdrawn until the latter date. She does not allege that she did not know, or that she had not been informed by telegraph or otherwise, of the withdrawal made November 5, 1891. But she claims that because the local officers on November 9, 1891, received her offer to purchase, and named a day for her to offer proof, she thereby initiated an entry, which she had the right to perfect under the terms of the order of withdrawal of November 5, 1891.

It is a sufficient answer to said claim, for me to say that the Commissioner's order of withdrawal took effect on the day of its date, November 5, 1891, four days before Zumwalt filed her sworn statement, expressing her desire to purchase. It is therefore unnecessary in this case to consider and determine the meaning of the phrase, "Entries already initiated may be perfected."

Your office decision is hereby affirmed.

CONTEST—PRE-EMPTION FILING.

GIVENS *v.* SIMPSON.

While it is not within the general policy of the Land Department to permit contests against pre-emption filings, yet a judgment on the merits may be given where the defendant has made default, and the evidence justifies an order of cancellation.

Secretary Smith to the Commissioner of the General Land Office, January 19, 1895. (J. I. H.) (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 3, T. 33 S., R. 15 W., Las Cruces, New Mexico, land district.

The record shows that John B. Simpson filed pre-emption declaratory statement for said tract July 25, 1890; that John T. Givens made homestead entry of the same November 25, 1891, and on March 10, 1892, the

latter filed an affidavit of contest against the former, alleging that Simpson was not a citizen of the United States at the time of making his filing, but was a citizen of Mexico; that at the time of his filing he had performed no act of settlement on the land; that he had never resided thereon, as required by law; that in the summer of 1890 he abandoned the same, and that his filing was not made for his own use and benefit, but for other persons, and for speculative purposes.

Notice of contest was served on Simpson personally, and hearing ordered before a notary public in Deming county, New Mexico. Simpson defaulted, and the testimony of contestant and his witnesses was taken. On receipt of the same, the local officers decided that the testimony showed that the filing was "for the benefit of other persons than himself, and that he has permanently abandoned the same." Notice of this decision was served on Simpson. No appeal was taken. The record was forwarded to your office, and in the course of business the record was considered, and by your office letter of April 29, 1893, the recommendation of the local officers was reversed, whereupon Givens prosecutes this appeal, assigning errors of law and fact.

In your said office judgment the facts as disclosed by the evidence are fairly and sufficiently set forth. The testimony as quoted by your office standing as it does uncontradicted indisputably shows that Simpson did not reside on the land, and that he had abandoned it as a pre-emption filing.

It is stated in your office decision that—

the general policy of the Department has been not to allow contests against pre-emption filings, but that the same be allowed to stand until one of the adverse claimants submits final proof. See *Field v. Black*, 2 L. D., 581, and numerous other cases.

It was upon this theory that your office decided the contest at bar. I do not think, however, that the doctrine thus announced should be applied here. In the case cited, and in most of the other cases bearing upon this subject, the question has arisen by reason of the fact that one of the parties attempted to assert a preference right of entry upon applications to contest a pre-emption filing. The several cases were fought by both parties to the action. In this case the defendant has been in default all the way along. It was not necessary for the contestant to take the procedure he did, but might have let the pre-emption filing rest until its expiration, or until he got ready to submit his final proof. He elected however, to proceed by contest, and I see no reason why he may not have a judgment on the merits, the evidence being sufficient, and the pre-emption claimant having made default.

The judgment of your office is therefore reversed.

SCHOOL LAND—INDEMNITY SELECTION.

DALY *v.* STATE OF WASHINGTON.

The validity of a school indemnity selection, slightly in excess of the basis, made under regulations that allowed such excess, is not affected by subsequent regulations that do not recognize such a selection.

The departmental regulations issued under the act of February 26, 1859, authorized the local officers to make school indemnity selections, where the county commissioners, after due notice, fail to make such selection either in person or through an agent.

An indemnity school selection, made by the Territory of Washington, reserves the land covered thereby; and land thus selected is not released from reservation by the act providing for the admission of the Territory into the Union.

Section 10 of said act, so far as it prescribes the manner or form of selection, refers to future selections only, and in no wise affects the legality of selections put in reservation prior to its passage.

Secretary Smith to the Commissioner of the General Land Office, January 19, 1895.
(J. I. H.) (F. W. C.)

I have considered the appeal by Chas. Daly from your office decision of July 22, 1893, sustaining the action of the local officers in rejecting his homestead application presented May 8, 1893, covering the SE. $\frac{1}{4}$ of Sec. 21, T. 3 N., R. 2 E., W. M., Vancouver land district, Washington, because of conflict with uncanceled indemnity school selection made July 30, 1863.

The selection in question consists of lots 1 and 2, Sec. 32, and S. $\frac{1}{2}$ of Sec. 21, T. 2 N., R. 2 E., embracing 366.18 acres, which were selected in lieu of loss by reason of fractional section sixteen, same town and range. According to the plat the loss amounts to 355.95 acres. Said selection was approved by the Secretary of the Interior January 27, 1872, as a proper reservation on account of the school grant.

The appeal urges that said selection was invalid: First, for want of a sufficient and legal basis; second, that it was made without sufficient authority or legal application by any authorized person; third, that any reservation of this tract by mere acquiescence, or otherwise, was annulled by the enabling act of February 22, 1889 (25 Stat., 676); and fourth, that said act in its tenth section forbade any selection exceeding three hundred and twenty acres for a loss such as claimed, and thereby rendered said alleged reservation illegal and void.

As to the first ground of error, namely, that the selection was void for want of sufficient and legal basis, it is urged that the selection being in excess of the basis, is not properly supported, and therefore illegal, and no bar to other disposition, the case of *Barclay et al. v. State of California*, 6 L. D., 699, being referred to.

It will be noticed that the excess of the selection over the loss amounts to but little less than eleven acres, and being embraced in a large list of selections undoubtedly was in compensation for a deficiency in some

other selection embraced in said list. In the case of James Lynch (7 L. D., 580), it was held that under the rulings of the Land department as formulated in the circular of July 23, 1885, (4 L. D., 79), a selection was not invalid though slightly in excess of the basis on which it is made. While this rule was subsequently changed by the circular of July 29, 1887, it can not affect selections previously made. The circular of July 23, 1885, provides that—

Where it occurs that a fraction in quantity of less than forty acres remains as the basis for a selection in a fractional township, or a section or a part of a section lost to the State, a specific subdivision, containing a quantity equal to the basis or a little more or less, may be selected and the State will be credited in the final adjustment of the grant with the balance in her favor, if any such balance should then be found to exist.

As to the second objection, that it was made without authority or legal application by any authorized person, I learn upon inquiry of your office that said selection was made by the register and receiver, who in their certificate state that the county commissioners failed, after due notice, to make the selection either personally or through an agent.

The authority to make indemnity selections in lieu of sections sixteen and thirty-six, where one or both is wanting or fractional in quantity, is conferred by the act of February 26, 1859 (11 Stat., 385), which has been repeatedly held in decisions by this Department to be applicable to the Territory of Washington, the selection in question having been made at a time when Washington was a Territory.

In the circular of August 21, 1862, (C. L. L., 438) under the act of February 26, 1859, it is held that the law directs that the selection authorized to be made by said act should be made by the Secretary of the Interior, and the following rule was prescribed for the guidance of registers and receivers:

Where the lands have not been offered at public sale the selections are to be made prior to said sale. The school agents may recommend the selections, and it may be proper for you to give notice to such agents that, prior to a certain day, to be fixed by you, recommendations will be received from them for school selections for certain townships, which townships will be specially designated in said notice. You will bear in mind, however, that no expense whatever will be incurred in the publication of such notice. If the school authorities after service of notice, should fail to make any recommendations, you will report your own selections.

It will therefore be seen that said selection was regularly made in accordance with said circular.

As to the third objection, that any reservation of the tract by mere acquiescence, or otherwise, was annulled by the enabling act of February 22, 1889, I have but to refer to the decision of the Department in the case of L. H. Wheeler (11 L. D., 381), in which it was held that—

An indemnity school selection made by the territory of Washington under the provisions of section 2275 R. S., reserves the land covered thereby from sale or entry, and land thus selected is not released from such reservation by the act providing for the admission of said Territory into the Union.

As to the fourth objection, that said act in its tenth section forbade any selection exceeding three hundred and twenty acres for a loss such as claimed, I am unable to find any support in the language of the section referred to. Said section provides:—

That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior.

Said section so far as it prescribes the manner or form of the selection to be made as indemnity, under the school grant, has reference merely to future selections and can in no wise affect the legality of the selections put in reservation prior to its passage. Said section merely provides that selection be made of other lands equivalent to the loss in legal subdivisions of not less than one-quarter section. This refers merely to the form of selection and in no wise limits the right of the State under a loss occasioned by a sale or other disposition, or by reason of a fractional township.

From a careful consideration of the several objections urged to the selection in question, I am unable to perceive any invalidity in said selection, which will therefore be considered as regular and the reservation previously ordered respected. Said reservation was a bar to the application by Daly and the same was therefore properly rejected. Your office decision of July 22, 1893, is accordingly affirmed.

PUBLIC SURVEY—PRIVATE CLAIM.

ORTIZ MINING GRANT.

A charge of fraud, or irregularity, in the matter of closing the public surveys on a patented private claim will not be investigated in the absence of a definite showing in support of such charge.

Secretary Smith to the Commissioner of the General Land Office, January 19, 1895. (J. I. H.) (P. J. C.)

I have before me the appeal of Charles F. Easeley from your office decision of February 10, 1893, denying his application for the re-establishment of the corners and monuments of the Ortiz Mining Grant, New Mexico.

A brief history of this grant will be necessary in order to understand the issue.

By section eight of the act of Congress of July 22, 1854 (10 Stat., 308), it was made the duty of the surveyor-general of New Mexico to ascertain the origin, nature, character and extent of all claims to grants

under the laws, usages and customs of Spain and Mexico, and for this purpose to examine witnesses, administer oaths, and perform all things necessary to the discovery of the facts. He was also required to make and file a report of all such claims as originated before the session of the territory by the treaty of Guadalupe Hidalgo to the United States, with his decision as to the validity of each, and that such report should be laid before Congress for its action, with a view to confirming all *bona fide* grants.

The surveyor-general made an examination, and reported upon the grant of the Ortiz Mine, under date of November 21, 1860, giving the names of the original claimants, to whom the grant was made by the Mexican government, under which they received judicial possession December 19, 1833, and the names of the owners at that time under regular conveyance from the original grantees.

The report describes the grant as being four leagues square, the mine being in the center, and the boundaries running to the cardinal points, being a mine and pastoral grant, and also a grant for water and agricultural purposes. The surveyor-general reached the conclusion that the claimants had a full and complete title, and therefore approved the grant, and recommended its final confirmation by Congress. This report was laid before the thirty-sixth Congress, at its second session, by the Secretary of the Interior, under date of January 1, 1861, and after consideration of the subject, Congress enacted "that the private land claim in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory in his report to the Commissioner of the General Land Office of November 24, 1860, designated as No. 43, be, and the same is hereby, confirmed," which act was approved March 1, 1861 (12 Stat., 887).

In August, 1861, the surveyor-general caused a survey to be made of the grant, which was approved by him September 10, 1861, and a copy thereof, together with the field notes, forwarded to your office on October 5, following.

The survey is of a tract four Spanish leagues square, the boundary lines running to the cardinal points, and the mine in the center.

Prior to March 3, 1869, there was no law providing for the issuing of patent for this grant, but on that date an act was approved by which the Commissioner of the General Land Office was authorized to cause the lands embraced in the several private grants to be surveyed and platted, and on the filing thereof in his office he should "issue patents for said lands in said Territory which have heretofore been confirmed by acts of Congress and surveyed, and plats of such survey filed in his office as aforesaid." (15 Stat., 455.)

Mr. Secretary Chandler, by letter of April 22, 1876, ordered a patent to issue to the owners of said grant, and the same was issued May 20, 1876, in accordance with a survey made by Thomas Means, which was approved by the surveyor-general September 10, 1861.

An examination of the records of the surveys in your office discloses the fact that the public lands surrounding this grant were connected with the survey of the grant on the east boundary thereof in February, 1883, and October, 1884, and on the north boundary in October, 1872.

On May 9, 1891, Easley directed the attention of your office to the fact that the north boundary of said grant was located on the ground a distance of between sixteen and eighteen chains north of the designated boundary in the field notes and on the plat of said grant, and he claimed that to this extent the ground as located in the grant encroached on the public domain.

Without going into details as to the subsequent correspondence between your office and Easley, suffice it to say that a sufficient showing was made by him which warranted your office on January 2, 1892, in directing the surveyor-general of New Mexico to notify the owners of the Ortiz Mine Grant to appear and show cause why an investigation should not be had in the premises as a basis for proper action by your office, and ordered a day to be fixed for a hearing, with notice to Easley and the grant owners.

The hearing was accordingly had, and the record forwarded to your office, the surveyor-general, in his letter of transmittal, stating, "It seems to me to be proved by the testimony that the north and east lines of said grant were established by deputy surveyor Means at too great a distance from the central point of said grant;" and your office, by letter of February 10, 1893, held that "the lines established upon the ground by the original survey must be held and considered as the true boundary of the grant, unless the said survey shall be set aside and the patent issued thereon annulled by due process of law."

Thereupon, Easley prosecutes this appeal, assigning errors as follows—

1. In finding and holding, that the only remedy against the alleged inclusion of public lands within the surveyed limits of the Ortiz Mine Grant, is by a suit for the cancellation of the patent issued thereon;

2. In failing to find, that sufficient evidence was adduced at the hearing to show that a large area of the public lands included within the said Ortiz Mine Grant on the northern and eastern sides thereof, as the boundaries of the said grant are defined by certain alleged monuments found, or alleged to be found, on the said northern and eastern sides;

3. In failing to find that the closing of the public surveys upon the said monuments was erroneous;

4. In failing to find that sufficient was shown at the hearing to require that an official examination in the field be made on the part of the United States for the purpose of determining whether or not the aforesaid monuments are so placed as to conform to the field notes of survey made by Deputy Surveyor Means, and whether said monuments are such, and the very monuments which were erected by the said Deputy Surveyor Means, and referred to in his field notes; and

5. In failing to hold that, if, as indicated by the proofs at the hearing, and which may be established by an official examination in the field, it appears that the monuments are now set upon the ground at a different point from where they were placed by said Deputy Surveyor Means, it is the duty of the Land Department to reset the

monuments where they had been placed, and to survey and sell the out-lying tracts as public lands of the United States.

The testimony submitted at the hearing on behalf of the petitioner was that of three witnesses. The witness Sluder, who is shown to be interested in having this petition granted, for the reason that he desires to secure some of the land claimed to be unlawfully included in the boundaries of the grant, never made a survey of the tract himself. His testimony is purely hearsay, and could not be accepted as of any value.

Easley, the petitioner, was, at the time he filed the petition, Sluder's attorney. He is shown to be a practical surveyor. He claims to have made a survey for the purpose of fixing the north boundary. He says he ran east from the shaft, the initial point of the grant; thence north the distance designated by the field notes of the grant and the official map thereof, to wit: five miles, sixteen chains and sixty-six and two-thirds links, but could find no corners or monuments at that point. He then "proceeded from that point north, and at five miles and thirty-six chains I intersected the north boundary of the Ortiz mine grant, as indicated and marked upon the surface of the earth there." This is the only personal investigation he has made. From his survey thus made he concludes that the monuments as now located are nineteen chains and thirty-three and one-third links too far north, or, in other words, that distance north of the calls in the patent. On cross-examination it is shown that he located the north boundary by the monuments placed there by the deputy surveyor at the time he subdivided the south part of T. 14, R. 8. He found "the corners" as the surveyor had designated them, and identified the north boundary by the surveyor's notes, that is, the United States surveyor who surveyed the public land; not the survey made of the grant.

I do not understand from this witness's testimony that he claims to have found any of the monuments that were set marking the boundaries of the grant survey. It is not shown that he made any search for them.

It will be seen that this testimony is wholly insufficient to warrant the Department in ordering an investigation. An examination of the field notes and official plat shows that stones marking the mile stations on each line were set by Means when he made the survey in 1861. It is hardly possible that all these stones are missing. At least the Department will not assume that they are. The testimony of these witnesses is entirely silent as to whether or not any of the monuments thus erected are in existence.

The only evidence that is in any wise reliable on this point is that of the witness White, who made the government survey in 1872 on the north and east sides of the grant. This question was put to him, after he had identified the field notes:

Q. On page 20 of said field notes you use the following language: "the east boundary of the Ortiz mine grant is therefore 27 chains, 75 links further east than represented by office data, the line having to stand as it is simply for me to report the

fact." And on page 25 of the field notes you use the following language: "this connection shows the grant to be 17 chains, 90 links, further north than represented, and compels me to report another large error." Please explain what errors, if any, you found as to the survey of the eastern boundary and northern boundary of the Ortiz mine grant as shown by the monuments as you found them at that time?

A. The extracts from the notes will show what I found.

He says he was instructed to close the lines of the public survey upon the grant lines, and in so doing it showed that the northern boundary was too far north, and the eastern too far east. On cross-examination he says he found two monuments of the Ortiz grant on the eastern boundary, one of which was the northeast corner.

I do not understand from this witness upon what data he based the report included in the question above quoted. He admits on cross-examination that he found two monuments of the Ortiz grant, and the presumption would be that he closed the survey on these monuments.

But be that as it may, I do not think the testimony of this witness strengthens that of the others in any essential particular. The attempt at showing fraud or irregularity in making the survey of the public lands as closed on the grant is too indefinite to warrant any investigation on the part of the government. (E. P. Sheldon *et al.*, 4 L. D., 506.)

For this reason the judgment of your office is affirmed.

AMENDMENT OF ENTRY—PRACTICE—APPEAL.

VARNER *v.* FAGARD.

An application to amend an entry should not be allowed without a hearing, where the entry as amended conflicts with the intervening entry of another.

Where an appeal from the local office is dismissed as insufficient, the decision below as to the facts should not be disturbed, except under the provisions of rule 48 of Practice.

Secretary Smith to the Commissioner of the General Land Office, January 19, 1895. (J. I. H.) (F. W. C.)

I have considered the appeal by Auguste Fagard from your office decision of March 30, 1893, holding for cancellation his homestead entry as to the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 2, T. 21 S., R. 6 E., Larned land district, Kansas, for conflict with the entry of Amos Varner.

Varner made homestead entry on December 26, 1883, for the NW. $\frac{1}{4}$ of said section 2, and on June 9, 1884, Fagard made homestead entry for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, same section.

On September 24, 1884, Varner applied to amend his entry so as to include the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, alleging mistake in his entry, and that he had settled thereon July 15, 1883.

By your office letter "G" of February 27, 1885, the amendment was allowed.

Both parties made proof upon their entries, and by your office letter of June 19, 1891, a hearing was ordered to determine their respective rights as to the tract in conflict. At this hearing Varner did not appear, and the local officers decided in favor of Fagard, from which no appeal was filed. The case was, however, remanded for further hearing by your office letter of January 18, 1892, at which Varner again failed to appear, the local officers again deciding in favor of Fagard.

By your office letter of May 27, 1892, the case was again remanded. At this hearing both parties appeared, and upon the testimony taken the local officers again decided in favor of Fagard, their decision being as follows:

The testimony in this case shows that the plaintiff made what may be called "a settlement" upon the tract in dispute in 1883, and during that year started to build a house and laid up some stone walls, 3 or 4 feet high, or as he calls it "up to the square." This house evidently was not in a habitable condition at any time prior to 1885, as a large majority of the witnesses who testify on that point say that it was without door, window or roof, in 1884, or was not completed until 1885.

The defendant built on this tract as he supposed in May 1884. A survey made soon after showed his house to be a short distance over the line and he then, in July, 1884, moved his house, or rebuilt on this tract, where he lived for about a year, and until forcibly driven off, by plaintiff, when he moved to another part of the land embraced in his entry.

There is but little evidence (outside of his own testimony) that plaintiff was a bona fide resident upon this tract in 1884. Most of his witnesses testify in a negative manner, saying they think he was not absent for six months; did not miss him for six months, or never knew of his being absent for six months. But several of defendant's witnesses are positive that he (plaintiff), was not an occupant of the land in 1884, and certainly not when the defendant settled thereon.

It seems to be conclusively proven that the "settlement" made by the plaintiff in 1883 was practically abandoned by him for at least a year, and that defendant's settlement was made during such period of abandonment, and without notice of any claim by plaintiff upon this tract.

Said abandonment should work a forfeiture of any right the plaintiff might have had to amend his original entry, as against the defendant's adverse claim, bona fide settlement, and recorded entry.

It is therefore held that the defendant has the superior right to the land in question, that his entry should be sustained, and that of plaintiff canceled as to the tract in dispute.

From said decision Varner appealed, but said appeal was by your office decision dismissed, and from such dismissal no appeal was taken.

Your office decision reviews the record, however, and upon a new finding of facts reverses the action of the local officers, holding for cancellation Fagard's entry as to the tract in conflict.

In the first place, it was error to allow Varner to amend his entry, without a hearing, after Fagard had made entry of the land.

It is alleged in Fagard's appeal that the several orders remanding the case were unauthorized, and that the record made under the last order should not be considered, as the privilege to cross-examine Varner and his witnesses was refused Fagard.

Without considering these several matters, and treating the entire record as regularly made, I must reverse your office decision.

In the the case of *Grass v. Northrop* (15 L. D., 400), it was held that where an appeal from the local office is dismissed as insufficient, the decision below as to the facts should not be disturbed, except under the provisions of rule 48 of practice.

Your office decision disregarded the finding of facts by the local officers, and upon the finding therein made reversed the local officers decision. Upon the finding by the local officers their decision was warranted, and is affirmed, and your office decision is reversed. Varner's entry as to the conflict will be canceled, and Fagard's entry permitted to remain intact.

MINING CLAIM—BOUNDARY—POSTING.

BYRNE, ET AL. *v.* SLAUSON.

If, during the pendency of a mineral application, the monuments marking the corners of the claim are destroyed by accident or design, the applicant need not be required to re-establish said corners before the issuance of patent.

Where due proof of posting is made, an allegation that the posted notice could not be found on the claim, does not call for republication of notice, in the absence of any prejudice shown on the part of the protestant.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1895. (J. I. H.) (P. J. C.)

The land involved in this appeal is mineral entry No. 98, Los Angeles, California, land district, known as the Lytle Creek Placer.

The record shows that on August 24, 1889, Johnathan S. Slauson made application for patent for said Lytle Creek Placer mining claim, on a survey approved by the surveyor-general of California, November 9, 1883. The record shows that the notice of application was posted on the claim and in the local office, and published in the newspaper designated by the register. The period of publication extended from August 31 to November 2, 1889, both days inclusive. Final entry was made and certificate issued November 30, 1889.

There were filed in the local office four "protests and adverse" claims against this entry. They are each marked in pencil, "Received Oct. 30, '89." Each is endorsed in ink and signed by the receiver:

"Nov. 1st, 1889, rejected for a failure to file within 60 days of publication, the filing not having been received on account of failure to pay the fees as required by Sec. 2238, U. S. R. S."

These protests and adverse claims were filed by Joseph N. Byrne, claiming a placer location, made by T. W. and T. A. Wilson on July 20, 1889; by E. T. Nihell on a similar location made July 29, 1889; by J. B. Frith on a similar location made by Josiah Van Loan March 30, 1886, and by H. A. James on a like location made July 29, 1889.

These "protests and adverse claims" were made under the provisions of section 2326, Revised Statutes, and as above shown were rejected, whereupon the protestants appealed, and with their appeal presented affidavits which tended to show that the improvements claimed to be on the land did not exist; that the boundaries were not marked as stated; that the notice of application for patent could not be found on the land at the point indicated, and that the Lytle Creek Placer had been abandoned in 1874. Your office by letter of January 22, 1890, affirmed the action of the local officers in rejecting the protest and adverse claims, but ordered a hearing for the purpose of determining the truth or falsity of the allegations therein.

Hearing was accordingly had before the local officers, and as a result they recommended a dismissal of the protest. Protestants appealed, and your office, by letter of April 8, 1893, decided that—

I find that improvements largely in excess of \$500 were placed on the ground in controversy by the entryman and his grantors; that the land claimed was not at date of application for patent, marked on the ground as to boundaries, and that notice of application for patent and plat were not posted thereon as required by law.

It appearing, therefore, that in these material matters there has been a failure to comply with law, the claimant will be required to re-establish under direction of the U. S. Surveyor General the corners of the claim in accordance with the original survey, and thereafter republish notice, due posting on the land and in the local office to be made. At the proper time proof of compliance with all these requirements should be made.

Slauson prosecutes this appeal, assigning error in holding that the land was not marked on the ground at date of application and the notice not posted as required by law, and in requiring him to re-advertise and re-establish the corners.

The only question before the Department on this appeal is as to the correctness of your findings of fact as to location of the corners and the posting of the notice. The other matters alleged in the protests have been decided in favor of the claimant, and no appeal has been taken.

It appears from the report of the deputy mineral surveyor, approved by the surveyor-general, that all the corners were properly set and marked when the official survey was made. This report is in proper form and is verified according to the rules. Hence it is *prima facie* evidence of the facts. Now the testimony is that the protestants had the lines run as called for in the advertised notice, "just before the date of the protest"—October 28, 1889,—and they were unable to find the posts or monuments at the corners designated. They also claim that at the same time they sought to find the notice posted on the claim at the point designated, and failed. There is no testimony whatever that tends to show that the corners were not placed as reported, or were not in place at the date of the application. And the same may be said of the posting of the plat. I do not think therefore that this evidence is sufficient to establish the fact that the corners were not

in existence at the date of the application, or that the notice was not posted.

The object of establishing the corners by the official survey is to definitely mark the boundaries. The post ordinarily used for that purpose is not imperishable or indestructible. The point at which it is located is therefore tied to some prominent peak or permanent object, so that it may be identified with mathematical accuracy when required. If pending the application for patent these corners are destroyed, either by accident or design, I do not think the applicant should be put to the expense of re-establishing them before patent can issue, or that it is ground for protest. The government and everybody concerned is amply protected as to the area and the boundaries by the official field notes and plats on file in the proper offices.

The statute requires notice to be posted on the claim, in the local office, and published in a newspaper. This is for the purpose of giving notice to those having adverse claims of the pending application, and all three methods must be pursued simultaneously. The obvious intention was that if adverse claimants did not get notice in one way, they might in either of the others. The only object, therefore, was to convey notice to the world that the claimant was seeking to enter the land. It is shown affirmatively—admitted by the protestants—that they saw the notice published, and in pursuance of that notice filed their adverse claims. Hence their rights are in no wise jeopardized, even although they did not find the notice on the claim. It is shown by the affidavit of two disinterested parties that this notice was posted at the point designated, and after the period of publication the claimant, as required by the rules, made his affidavit that it had remained posted during the period of publication. In view of these facts, I do not think he should again be required to publish his application.

Aside from these facts, which indicate lack of merit in these protests, I think the entire record shows a total want of good faith on the part of the protestants. If they had *bona fide* adverse rights, it seems that they would have pursued the statutory remedy they evidently started out to do. They were not ignorant of what was required of them, and do not plead want of notice. It is shown by the evidence of two of the protestants—the only ones of their number who testified—that their so-called placer locations were abandoned the next year; that they had no interest in them, and one of them says another of the protestants—Frith—was paying his expenses while at the hearing, and his only object was to protect Frith.

Your judgment is therefore reversed. The protests will be dismissed and Slauson's entry passed to patent.

INDIAN LANDS—ALLOTMENT RIGHTS.

AMY HAUSER ET AL. (ON REVIEW.)

The acceptance of an allotment under section 4, act of February 8, 1887, of land outside of a reservation, precludes the recognition of a further allotment right within the reservation under the later act of March 3, 1891, and where such right has been recognized the allottee will be required to elect as between the two allotments.

Secretary Smith to the Commissioner of Indian Affairs, January 21, 1895.
(F. L. C.)

The attorney for Amy Hauser, Mary E. Keith, Josephine Shields *et al.*, Cheyenne and Arapahoe Indians, has filed a motion for review of my predecessor's decision of March 3, 1893, and by relation that of Acting Secretary Chandler of August 21, 1891, reported in 13 L. D., 185. The grounds of the motion are as follows:

First. That the Honorable Secretary erred in his conclusion of law, in assuming that said Indians received allotments under the general act of February 8, 1887 (24 Stat., 388), outside of the Cheyenne and Arapahoe reservation, and that the same Indians also received "allotments" under the act of March 3, 1891 (26 Stat., 1023-5), within said reservation.

Second. The Honorable Secretary erred in his conclusion of law in assuming that neither of the tracts (so-called allotments) were bestowed, *in the light of* compensation for property sold, conveyed and surrendered by the tribe.

Third. The Honorable Assistant Secretary, in his approval of the opinion of the Chief Law Clerk, of the Office of the Assistant Attorney General, erred in assuming that claimants were asking or contending for *double* allotments. And the Chief Law Clerk erred in assuming that the lands (160 acres each), guaranteed to the Cheyenne and Arapahoe Indians, by Article 3, of the Agreement of October, 1890, were given to said Indians as allotments, rather than as part consideration for lands ceded and conveyed to the United States as the common property of said tribe.

Fourth. The Honorable Secretary, therefore, in his said decision of March 3, 1893, erred in not holding that the said claimants were entitled to their allotments, secured and guaranteed to them by act of Congress approved February 8, 1887, and that they were not also entitled to 160 acres each on the reservation, as part consideration for their interest in the common property of said tribes.

Wherefore, claimants pray that this motion for review of the decision complained of may be granted, and that the said decision may be reversed, the allotments under the law of 1887 held intact, and the land (160 acres each) guaranteed by the agreement of October, 1890, with the Cheyenne and Arapahoe tribes made good, to the end that the law may be fulfilled.

In connection with the departmental decision rendered by Acting Secretary Chandler (13 L. D., 185), the law and treaties, as well as the rulings of the Department, applicable to the case, were considered, and the conclusion reached that:

Amy Hauser and her children are not entitled to allotments of lands within said Cheyenne and Arapahoe reservation, so long as their allotments already made under the act of 1887 are outstanding and uncanceled.

In the decision of Secretary Noble, of March 3, 1893 (see letter-press copy-book No. 7, Ind. Div., page 315), it was found:

That said Indians received allotments under the general act of February 8, 1887 (24 Stat., 388), outside of the Cheyenne and Arapahoe reservation, and the same

Indians received an allotment of lands under the act of March 3, 1891 (26 Stat., 1023 and 1025), within said reservation, and the latter allotments have been patented, but the former have not.

Continuing, the Secretary said:

I do not deem it necessary to again discuss the question of the right of these Indians to receive more than one allotment. I have on different occasions expressed my views on this subject, which are to the effect that it was the intention of Congress, by providing for each Indian a tract of land upon which he or she could establish a home, to thus dissolve the tribal relations, and gradually induce the Indians to become civilized citizens of the country.

These separate tracts of land were not bestowed in the light of compensation for property surrendered by the tribes, but were bestowed, as before stated, in the hope of promoting civilization among these people, hence the bestowal of one tract of land, one home, was all that was contemplated by Congress.

Indian Lands—Allotments' (8 L. D., 647);

John and Peter Anderson (11 L. D., 103);

Henry Ford (12 L. D., 181);

Amy Hauser (13 L. D., 186).

In accordance with these views, you are hereby requested to examine the lists submitted by the Commissioner of the General Land Office, and where double allotments have been made, and one allotment has been patented, and the other not, you will prepare a list of the tracts not patented, and submit the same to me, in order that action may be taken to revoke the approval of said lists.

The history of these cases is as follows:

Some twenty years ago, Herman Hauser, B. F. Keith and Peter Shields, citizens of the United States, married Cheyenne and Arapahoe Indian wives. Prior to that time the treaty of 1867 had been made with those tribes, which provided that:

If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation not exceeding three hundred and twenty acres in extent, which tract . . . shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Soon after the marriage of said parties to the Cheyenne and Arapahoe Indian women, each head of a family was placed in possession of 320 acres of land, which were supposed by the parties and by the United States agent of the Cheyenne and Arapahoe reservation to be a part of that reservation. Upon the tracts so selected they located and built homes and otherwise made valuable improvements. Subsequently it was ascertained that they had been erroneously located on lands outside of the Cheyenne and Arapahoe reservation, and the parties continued to reside there and make improvements. Thus matters stood until just before the Territory of Oklahoma was opened to settlement, April 22, 1889, under the President's proclamation. The lands so settled and located upon are within the Territory of Oklahoma as thus opened.

The situation of these people, their occupancy of these lands, and the circumstances under which they settled upon these lands, having

been brought to the attention of Hon. John W. Noble, Secretary of the Interior, he directed that the three white men who married Cheyenne and Arapahoe Indian women should be permitted to make homestead entries on 160 acres of the lands, which they had settled upon and improved; and that the Indian women, their wives, should apply for entry of the lands they occupied, to the extent of 160 acres each, under the provisions of section four of the general allotment law of 1887 (24 Stat., 388), which law provides for allotments to Indians out of public lands. After the lands within the Territory of Oklahoma had been opened to settlement, to wit, on July 9, 1889, Amy Hauser, wife of Herman Hauser; Mary E. Keith, wife of B. F. Keith, and Josephine Shields, wife of Peter Shields, applied for allotments under the general allotment law of 1887. These selections were allotted to them May 8, 1890, and approved by the Secretary of the Interior June 28, 1892.

At the time these Indian women applied to take allotments in the public lands they were not residing upon the reservation provided for the tribe to which they belonged. The only law, if any, applicable to Indians situated as were these people, at the date of their applications for allotments was the fourth section of the act approved February 8, 1887. So much of said section as is pertinent to this investigation is as follows:

Sec. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations;

Pursuant to the suggestion of Secretary Noble, that these women could take allotments under the fourth section of the act of 1887, in the lands they occupied, they applied for and were allowed these allotments.

Did these allottees, then, retain any such interest in the reservation as would warrant the allowance to them of allotments within said reservation?

The sixth section of the act of 1887 reads as follows:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no State or Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of

Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Subsequent to these allotments under section four of the act of 1887, to Amy Hauser *et al.*, the act of March 3, 1891 (26 Stat., 989), was passed. Said act, on page 1022 *et seq.*, embodied the agreement entered into in October, 1890, with the Cheyenne and Arapahoe tribes of Indians.

Article three of said agreement, found in section 13 of the act, reads as follows:

Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article two hereof, and in part consideration for the cession of lands named in the preceding article, it is agreed by the United States that each member of the said Cheyenne and Arapahoe tribes of Indians over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land, to be held, and owned in severalty, to conform to legal surveys in boundary; and that the father, or if he be dead, the mother, if members of either of said tribes of Indians, shall have a right to select a like amount of land for each of his or her children under the age of eighteen years, and that the Commissioner of Indian Affairs, or some one by him appointed for the purpose, shall select a like amount of land for each orphan child belonging to either of said tribes under the age of eighteen years.

While I am not prepared to say that Amy Hauser, and other Indians similarly situated, may not insist on a compliance with the technical terms of the agreement as embodied in the act of 1891, or that they may not be allowed to make and have approved to them selections as provided for in said act, I have no hesitation in concluding that if they do insist upon such allotments, the application so pressed should be regarded as a waiver of all claim to lands outside the reservation under the act of 1887.

Per contra, the acceptance of and adherence to allotments made outside the reservation should be regarded as a release and waiver of whatever claim they might otherwise have under the act of 1891 within the reservation.

I am not without doubt as to the authority of Secretary Noble to allow the allotments outside the Cheyenne reservation and within what was known as Creek or Seminole country, opened up under the act of March 2, 1889, 25 Stat., 980 (1004), as a part of Oklahoma, inasmuch as said lands were to be disposed of "to actual settlers under the homestead laws only," but, if the allotments thus made are adhered to by the Indians, I am not disposed to question Secretary Noble's authority, nor to interfere with said allotments, provided they be accepted in lieu of selections and allotments within the reservation under the act of 1891. The parties were located on these lands just over the line outside of the Cheyenne and Arapahoe reservation, under the impression and belief on their part and that of the locating agent that they were being located on Cheyenne and Arapahoe lands. They were thus located under the provisions of the treaty of 1867, *supra*, which provided for selection of and location upon three hundred and twenty

acres *within the reservation*. Though actually without, they were treated as within. Finding the mistake, they applied to locate under the provisions of the fourth section of the act of 1887. They did this upon lands made a part of Oklahoma by the act of March 2, 1889, *supra*.

Secretary Noble in allowing the allotments under the act of 1887 doubtless had in mind the protection of the settlements of the allottees, and the preservation to them of their improvements.

The Indian allotment laws have one common purpose, that of breaking up tribal relations, encouraging the Indians to become individual land owners and citizens, with the right to assert and protect their individual and property rights as other citizens of the United States. Keeping this in view, said laws must be considered and construed *in pari materia*.

This was done by the Department, July 14, 1890, in the case of John and Peter Anderson (11 L. D., 103), when it was held that the Pottawatomie Indians might elect whether they would take allotments under the act of May 23, 1872 (17 Stat., 159), a special act providing for them particularly, or under the allotment act of 1887, providing for Indians generally, but that they could not take under both acts. The same doctrine was announced in the case of John Anderson (13 L. D., 312).

Again, it has been held that an Indian who has availed himself of the benefit of the pre-emption and homestead laws is not entitled to an allotment under the fourth section of the general allotment act of 1887. (Henry Ford, 12 L. D., 181.)

An examination of said act will show that it in terms made no such exceptions. The conclusion must therefore be that these and similar rulings were based on the idea that the intention of Congress in providing allotments was to encourage the Indians to become home seekers and citizens, rather than remain mere members of dependent tribes.

A home once gotten, the purpose of the allotment laws have been subserved. That which they were intended to effect for the Indian has been accomplished.

It is contended, however, in behalf of the Indians, that to allow the allotments under the act of 1887, and also to allow said Indians to take lands within the Cheyenne and Arapahoe reservation is not a case of double allotments, for the reason that the lands acquired under the last named act are as part consideration for the surrender of the reservation, and are not allotments. But the agreement under which the reservation was ceded to the United States styles the lands, to be received and held in severalty by the Indians, allotments, and while they are spoken of as "part consideration for the cession," I am strongly impressed with the view that the intention was to provide homes for those members of the tribe who had not had the benefit of any allotment act or settlement law.

In this sense and having in view the general purpose of the allot-

ment laws, Congress by the act of 1891 provided for allotments out of the territory ceded to be treated as a part consideration for the cession.

The presumption would naturally be that the individual members of the tribe living on the reservation had not received the benefit of the general allotment laws, and the allotment to be made under the act of 1891 might with propriety be styled a "part consideration for the cession," inasmuch as by the provisions of said act the Indians would get double the amount of land which they could take under the act of 1887, as amended by the act of February 28, 1891 (26 Stat., 794); and, furthermore, would preserve to them homes on lands with which they were familiar, and in a locality which, by reason of their long occupancy, had come to possess for them a peculiar and special value as a home.

Referring again to the selections made under the act of 1887, it is to be noted that they were made July 9, 1889; that the allotments were made May 8, 1890, and were approved by the Secretary of the Interior June 28, 1892, about ten months after the decision of the Department of August 21, 1891, which, in effect, required Amy Hauser and her children to elect whether they would hold the lands allotted under the act of 1887, or relinquish them and take lands within the Cheyenne and Arapahoe reservation under the act of 1891.

By pursuing their claims to allotment under the act of 1887, and securing departmental approval as above indicated, they might be held to have elected, pursuant to said decision of August 21, 1891, to take under the act of 1887, and to have waived and abandoned all claim under the act of 1891. Ordinarily, under and following a decision requiring an election between two claims or kinds of claims, the continued prosecution of the one would be regarded and treated as the waiver and abandonment of the other.

In this case, however, between Indians and the government, I am not disposed to rule thus strictly, but am willing yet to allow election within a reasonable time, the result of the final choice under the one law to be accepted and treated as a waiver of all claim or right under the other.

The motion for review is denied.

You will notify the parties in interest, and pending their decision, will suspend or cause to be suspended all further action with reference to their claims, whether under the act of 1887, or that of 1891.

I am informed that inquiry at your office discloses the fact that patents have issued to the Shields and Keith families, fourteen in number, Indians similarly situated to Amy Hauser and her family. This places the lands covered by said patents beyond the jurisdiction of this Department, and under the views herein expressed will preclude the patentees from receiving any lands under the act of 1887.

SCHOOL LAND—SETTLEMENT BEFORE SURVEY.

CICHY v. PALTZER.

A pre-emption settlement on school land prior to survey initiates a right that is not defeated by failure to make final proof within the statutory period, where the State waives its claim to the land involved.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1895. (J. I. H.) (F. W. C.)

I have considered the appeal filed on behalf of the heirs of Phillip Paltzer from your office decision of March 22, 1893, holding that the State of Minnesota has the sole disposal of the W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and lots 3 and 4, Sec. 36, T. 131 N., R. 39 W., St. Cloud land district, Minnesota.

Phillip Paltzer settled upon this land while it was yet unsurveyed and on April 27, 1873, he filed pre-emption declaratory statement for the same, the approved plat of survey of this township having been filed on March 27th of that year.

Paltzer died in June, 1875, without having offered proof, leaving a widow and several children.

The widow, and some of the children, have since continued to reside upon the land.

In 1879 the widow married one Michael Kline, who has since resided upon the land.

In 1881 notice was given of intention to offer proof upon the filing by Paltzer, but no such proof was ever offered.

On October 12, 1886, Paul Cichy purchased of the State, lot No. 3; erected a house thereon and has since improved the land.

On June 10, 1889, an application intended as a transmutation of the filing by Phillip Paltzer, to homestead the land first described, was allowed, subject to appeal by the State.

By letter of October 11, 1889, the Auditor of the State advised the local officers by letter as follows:

Relying upon your (the register's) statement that said application was supported by affidavit corroborated by the evidence of two witnesses that settlement was made prior to survey, the State made no appeal and now makes no claim to the said described lands adverse to that of the homestead application of Anna M. Paltzer.

Upon receipt of this letter the homestead application was allowed as homestead No. 14,608, on October 17, 1889, and final proof was offered thereon on December 11th following.

Against the acceptance of said proof Cichy protested urging an adverse claim as to lot No. 3, under his purchase of the State, but said protest was disregarded and final certificate issued upon said homestead entry.

In considering the proof, your office dismissed the protest by Cichy with a view to patenting the entry, and Cichy appealed to this Department.

Said appeal was considered in departmental decision of April 15, 1892

(14 L. D., 384), and the case was remanded for hearing upon Cichy's protest.

The record made shows that the State has never selected other land in lieu of that filed for by Phillip Paltzer, and your decision holds, in effect, that as proof was not made upon said filing within the time limited by law, that the right of the State therefore attached to the land, and that entry could not thereafter be allowed on behalf of the heirs.

From the appeal it appears that no claim is made on behalf of the heirs to lot No. 3, which has been relinquished in favor of Cichy, and as the State seems to have waived any claim it may have in favor of the heirs, and is not protesting their right to perfect claim, the sole question for consideration is: was the failure to make proof within time an absolute forfeiture of all claim, and has the title vested in the State?

There can be no question but that the State, finding the land in the possession of Paltzer at the date of survey, might have selected other land in lieu thereof, or awaited the determination of his claim, and had the settler's claim been forfeited, the State's title would have at once vested, not having in the meantime selected other lands in lieu thereof; the failure of the settler to make proof in time does not work a forfeiture of the pre-emption right, and even if it be admitted that the State might have taken advantage of this failure, yet, as it has not appeared to protest against the right of the heirs to complete title to the land, but, on the contrary, has waived its right in their favor, I have to direct that the entry made in the name of Anna Maria Paltzer, be amended to the heirs of Phillip Paltzer, deceased, as the proof submitted shows it was so intended, and that lot No. 3, be eliminated in accordance with their relinquishment.

In this way the State will acquire title to said lot No. 3, to the benefit of its transferee, Cichy, and the heirs of Phillip Paltzer will be protected in their possession as to the remainder of the lands.

Your office decision is accordingly modified.

INDIAN LANDS—SISSETON AND WAHPETON LANDS.

EDWARD PARANT.

The act of March 3, 1891, and the proclamation of the President issued thereunder, opening to settlement the Sisseton and Wahpeton lands, contain no provision disqualifying persons who enter upon said lands prior to the time fixed therefor from subsequently entering any of said lands.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1895. (J. I. H.) (C. W. P.)

This appeal is filed by Edward Parant from the decision of your office of April 29, 1893, holding for cancellation his additional homestead entry for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 34, T. 129 R. 54, Watertown land district, South Dakota.

The original entry in this case was made, November 27, 1876, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 26, T. 138, R. 49, Fargo land district, North Dakota, and final certificate issued to him for said tract, December 16, 1881. The land lies within railroad limits.

July 26, 1892, Parant made his additional homestead entry, under the provisions of the act of March 3, 1879, (20 Stat., 472). This tract is ceded land, lying within the Sisseton and Wahpeton Indian reservation, known as Lake Traverse reservation, and not contiguous to the land embraced in his original entry.

While conceding that the additional entry, which is invalid under the act of March 3, 1879, should be allowed to stand as valid under the sixth section of the act of March 2, 1889, (25 Stat., 854), if Parant is otherwise qualified, your office held that he is not so qualified, for the reason that he had settled upon and occupied the land before the hour of 12 o'clock, noon, on the 15th day of April, 1892, when the lands in the Lake Traverse reservation were opened to settlement.

The lands in the Lake Traverse reservation were not subject to entry or disposal under the land laws, prior to the proclamation of the President of the United States, of the 11th of April, 1892, under the provisions of the act of Congress approved March 3, 1891, (26 Stat., 1039), and Parant could obtain no settlement right by the occupation of this land prior to that date.

But there is nothing in the act of March 3, 1891, (26 Stat., 1039), or in the proclamation of the President, which can be construed into a disqualification to make an entry, in one who had entered upon and occupied land within the reservation prior to the day on which these lands were opened to settlement.

The statutes, and proclamation of the President, in the case of the Oklahoma lands, construed by the supreme court, in the case of *Smith v. Townsend* (148 U. S., 490), were very different from the act of March 3, 1891, (26 Stat., 1039), and the President's proclamation of April 11, 1892, opening the Lake Traverse reservation to settlement. Neither in the act of Congress, nor in the President's proclamation, is there any provision disqualifying persons who shall enter upon the lands prior to the time they are opened to settlement, from ever entering any of the lands, or acquiring any rights therein, as in the case of the Oklahoma lands. The only clause in the President's proclamation forbidding persons to enter the reservation, is in these words:

Warning, moreover, is hereby given, that until said lands are opened to settlement, as herein provided, all persons, save said Indians, are forbidden to enter upon and occupy the same, or any part thereof.

See also, the case of *Madella O. Wilson* (17 L. D., 153), wherein it was held that the act of March 3, 1891, opening to entry the Sisseton lands containing no penalty for entering the reservation prior to the time fixed therefor in the President's proclamation, although said proclamation forbids such entrance, the right of entry was not forfeited by failure to observe said injunction.

For these reasons I can not agree with you, that Parant is disqualified to take a homestead in the Lake Traverse reservation.

The judgment of your office is therefore reversed.

HOMESTEAD—ADDITIONAL ENTRY—ACTS OF MARCH 3, 1879, AND
MARCH 2, 1889.

EWING *v.* COPELAND.

An additional entry under section five, act of March 2, 1889, should not be allowed where the applicant is not at such time occupying the land covered by his original entry.

The right to make an additional entry under the act of March 3, 1879, extends only to settlers on public lands within railroad limits who, under existing laws, were restricted to an entry of eighty acres.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1895. (J. I. H.) (F. W. C.)

I have considered the appeal by W. C. Copeland from your office decision of July 31, 1893, holding for cancellation his additional homestead entry No. 21,045, final certificate No. 7,365, made March 18, 1891, for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 35, T. 9 S., R. 8 E., Huntsville land district, Alabama, upon the contest of James Ewing.

From the record transmitted upon the appeal by Copeland it appears that on January 21, 1878, he made homestead entry No. 7999 for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 26, T. 9 S., R. 8 E., upon which final certificate No. 3,861 issued June 10, 1885.

On March 18, 1891, he made the additional entry above described under the fifth section of the act of March 2, 1889 (25 Stat., 854).

On April 14, 1891, James Ewing filed an affidavit of contest against said additional entry, alleging prior settlement and also that W. C. Copeland was not the occupant of the land covered by his original entry, at the time of making the additional under consideration.

Upon the record made at the hearing ordered at the said contest, the local officers recommended that contest be dismissed and that the defendant's entry be permitted to stand.

Upon appeal, your office decision found the following facts:

W. C. Copeland moved on the land covered by his original entry in 1863 or 1864, renting the same from Mr. Patterson. In 1866 he bought Patterson's possessory right to said original forty and twenty acres of the tract now in dispute. He lived on his original entry from 1863 or 1864 to 1881, when he moved on the land in dispute and resided there for five or more years. In 1886 or 1887 he moved on account of extreme old age and the sickness of his wife and daughter, to the house of his son W. R. Copeland, on the land immediately north of his original entry, and has since resided there.

Upon this state of facts you found that he was not an occupant of the land covered by his original entry at the time of making the entry in question, and therefore held his additional entry for cancellation.

In his appeal, Copeland does not dispute the finding of facts by your office, but claims that he is protected in his entry in question by the provisions of the act of March 3, 1879 (20 Stat., 472), and May 6, 1886 (24 Stat., 22), and that although his entry was made under the act of March 2, 1889, this technicality should not deprive him of his equities under the acts last referred to.

It is plain that his additional entry was improperly allowed under the act of March 2, 1889, *supra*, for the reason that he was not an occupant of the land covered by his original entry at the time of making the entry under consideration.

It but remains, therefore, to consider whether he is entitled to claim the benefits of the act of March 3, 1879, and May 6, 1886, for if he is, I am of opinion that the fact that his entry was made under the act of March 2, 1889, should not deprive him of his right to the land.

The act of March 3, 1879, grants an additional homestead entry to those settlers on public lands within railroad limits who were restricted under existing laws to eighty acres and the act of May 6, 1886, was of like import.

From an examination of the record, I am unable to find that Copeland was restricted under the laws in force at the time of making his entry to the forty acres covered by said entry. Within railroad limits, prior to the passage of the act of March 3, 1879, the lands being rated at double minimum, the homesteader was restricted in making entry to eighty acres or one-half the quantity that might be entered of single minimum land. Copeland's original entry covered but forty acres, and if he chose to make entry for this limited amount, there being no other available land contiguous with said tract, the act of March 3, 1879, affords him no relief.

The land in question covered by the additional entry being a part of an odd-numbered section was at the date of Copeland's entry reserved in satisfaction of a previous grant made to aid in the construction of a railroad, but being opposite unconstructed road was, by the act of September 29, 1890 (26 Stat., 496), forfeited and restored to the public domain. It is after this forfeiture that Copeland seeks to make additional entry thereof, as before stated.

From a careful review of the matter, I am of the opinion that Copeland is not entitled to an additional entry under the act of March 3, 1879, and having found that his entry was improperly allowed under the act of March 2, 1889, I affirm your office decision and direct that the said entry be canceled.

HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.

SELIG ET AL. *v.* CUSHING.

A homestead entry allowed on preliminary papers executed while the land is covered by the prior entry of another is not void but voidable. The defect in such case may be cured in the absence of any adverse claim, and can not be taken advantage of by one who does not show any priority of right in himself.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1895. (J. I. H.) (J. L. McC.)

Frank Cushing, on August 24, 1892, filed application to make homestead entry of the SE. $\frac{1}{4}$ of Sec. 3, T. 104, R. 9, Chamberlain land district, South Dakota.

Said application accompanied an affidavit of contest against the prior entry of one Alfred E. Sanderlins—which, however, was then under contest by one Paul L. Ashley.

As the result of Ashley's contest, then pending before your office, Sanderlins' entry was canceled by your office letter of October 7, 1892.

Cushing alleges that Ashley's contest was speculative, and that the latter had no homestead right to assert—and the land was subject to homestead entry only. However this may be, Ashley never applied to enter the tract. But as soon as your office letter canceling Sanderlins' entry was received at the local office, the register and receiver, on October 12, 1892, issued certificate of entry to Cushing.

On November 25, 1892, John P. Selig applied to make homestead entry of the tract, which the local officers rejected because of the prior entry by Cushing. Selig appealed to your office, which (on January 14, 1893,) sustained the action of the local officers. Thereupon he appeals to the Department, on the ground substantially, that he (the appellant) was the first *legal* applicant, Cushing's entry having been improperly allowed, in that the application was made prior to the cancellation of the homestead entry then covering the tract and not canceled until forty-nine days afterward—thus overruling departmental circular of January 8, 1878, "and all the decisions which have been rendered thereunder, up to the present date"—citing the case of *F. H. Merrill* (10 L. D., 364); *Maggie Laird* (13 L. D., 502); *Holmes v. Hockett* (14 L. D., 127); and *Meyer v. Brown* (15 L. D., 307).

A perusal of the cases cited shows that they are not precedents for the case at bar. In each of the cases named an application to enter was presented, but *was rejected* because of an existing entry. In the case at bar the entry was *allowed*. The uniform ruling of the Department has been that, although an entry ought not to be allowed for a tract not subject to appropriation at the time, nor allowed upon an affidavit made when the land was not subject to appropriation, yet if such entry is allowed, it is not void, only voidable, and the defect may be cured by the claimant in the absence of an adverse claim. See *Meyers v. Smith* (3 L. D., 526); *Schroterberger v. Arnold* (6 L. D., 425);

Richard Griffin (11 L. D., 231); Thomas et al. v. Spence (12 L. D., 639); Calhoun v. Daily (14 L. D., 490).

In the case last cited the Department said that "the allowance by the local officers of the application by Daily to make homestead entry of the land" (then covered by the as yet uncanceled entry of one Janzig)—

Followed by due compliance with law on his part, in the matter of residence, improvements, and cultivation, constituted a claim which attached on the cancellation of the prior entry of Janzig, to the exclusion of the right of Calhoun who subsequently applied to make entry therefor, and she will not be heard to question the validity of such improperly allowed entry, unless she shows that the allowance of said entry is in violation of her prior right or equity.

In the case at bar, Selig shows no right or equity in himself prior to October 12, 1892, the date of Cushing's entry (the land at that time being subject to his appropriation).

Selig's application to enter was therefore properly rejected.

On December 20, 1892, one William S. Hart filed contest affidavit against Cushing's entry, on the ground that the allowance of Cushing's entry, under the circumstances hereinbefore set forth, "was improper, illegal, and contrary to the rules and regulations of the Department." Hart has not appealed from your office decision in favor of Cushing, and is therefore not now in the case.

Said decision of your office is hereby affirmed.

MINING CLAIM—PATENT—DESCRIPTION OF CLAIM.

SOLD AGAIN FRACTION MINING LODGE.

A patent for a mining claim may issue on the application of a company though the location of said claim be made by an individual in whom the possessory right apparently remains, where it is shown that in fact said location was made for and in behalf of said company.

The receiver's receipt and final certificate should describe a mining claim by the name borne in the certificate of location and official survey.

Secretary Smith to the Commissioner of the General Land Office, January 21, 1895.
(J. I. H.) (P. J. C.)

The record in this case shows that one V. M. Clement located a mining claim in the Yreka mining district, Shoshone county, Idaho, on August 12, 1890, and called it the "Sold Again Fraction." On the application of said Clement an official survey was made of the ground and approved by the surveyor-general, on July 6, 1891, which was designated "Sold Again Fraction," and mineral survey No. 933.

On January 5, 1893, the Bunker Hill and Sullivan Mining and Concentrating Company, by the said Clement, as attorney in fact, made application for patent, in which the land claimed is described both as "Sold Again" and "Sold Again Fraction," and final entry made March 25, 1893, under the name of "Sold Again," also described as survey No. 933.

When the matter came up for consideration in your office, the application was rejected, because by the abstract of title it was shown that Clement, in his own individual capacity, held the title to said mining claim at the date of the application for patent, and did not transfer it to the company until January 10, 1893, and the company was given sixty days in which to show title to said claim at the date of the application for patent, and to furnish evidence as to the correct name of said claim.

In pursuance of that order, one F. W. Bradley, who deposes that he is the general manager of the applicant company, and acquainted with the mining claim in controversy, swears that Clement, who was at the time of the location of the ground general manager of said company, made said location for and on behalf of the corporation. The claim was located as the "Sold Again Fraction." It has been called the "Sold Again," and was deeded by said Clement to the corporation under the name "Sold Again." That the annual labor required by law had been performed by the applicant and paid for by it and that at the time of the application for patent the company was the owner of said claim.

Without going into detail as to the subsequent correspondence with regard to the matter, suffice it to say that the affidavit of Clement, made July 21, 1893, in London, England, was presented, by which it is shown that he located said claim

for and in behalf of the Bunker Hill and Sullivan Mining and Concentrating Company, as its agent and general manager, and had applied for patent on the same for and in behalf of said company, and all my acts in regard to this said 'Sold Again Quartz Mine Claim' have been in behalf and in favor of said Bunker Hill and Sullivan Mining and Concentrating Company as its agent and general manager.

Your office, by letters of August 14 and 30, 1893, held that the proof submitted was not sufficient to comply with the regulations, and that the entry should be canceled, whereupon the claimant prosecutes this appeal.

It seems to me that the showing here made is sufficient to warrant the Department in issuing a patent to the applicant. It is true that there has been a very lax manner of describing the claim by the name under which the ground was located, but I think it is sufficiently identified by the official survey and its description as Lot 933, to make it certain that the identical ground applied for is that which was located. It seems to me that the showing made by the subsequent affidavits above quoted are sufficient, together with the deed made by Clement to the company, to warrant the issuance of a patent to it under its application.

The case relied upon by your office, that of the Montana Company (6 L. D., 261) is not in point. The gist of that case is given in the syllabus. It is, that "in the absence of a clear showing of possessory right the application for patent must be denied." In that case the applicant company had prior to its application for patent for the land

deeded it to another corporation; hence it was estopped from claiming the possessory right to the property.

In view of the fact that there is no adverse claim, this entry may be passed to patent, upon the amendment of the receiver's receipt and final certificate of entry being changed so as to describe the mining claim as it is in the certificate of location and the official survey—that is to say, that the receipt should be issued for the claim as "Sold Again Fraction," and not as it is, "Sold Again." For this purpose I would suggest that the papers be returned to the local office, and that the company make formal application for this change.

Your office judgment is therefore reversed.

PRIVATE CLAIM—SUCCESSION PROCEEDINGS.

SYLVESTRE BOSSIER.

Where, in the prosecution of a private claim through succession proceedings, the jurisdiction of the probate court is attacked, the Department will suspend action pending the determination of such question in the courts.

Secretary Smith to the Commissioner of the General Land Office, January 22, 1895.
(J. I. H.)

I have considered the motion for review of departmental decision in the case of the private land claim of Sylvestre Bossier, rendered on July 7, 1893, and reported in 17 L. D., p. 56.

The decision now under review holds that the judgment of the court through which Robinson holds title cannot be attacked collaterally in a proceeding before this Department, but only on a direct proceeding where the jurisdiction of the estate of Bossier was assumed, predicating such decision upon the rulings of the supreme court in the case of *Simmons v. Saul* (138 U. S., 439).

The principle and controlling ground of error alleged in the motion for review is the third ground of error, which is as follows, to wit:

The decision of the honorable Secretary is plainly based upon a misapprehension of the language of the opinion in *Simmons v. Saul* (*supra*), in this: that it assumes the decision of the supreme court in that case to have been based upon the ground that the facts necessary to the jurisdiction of the Louisiana probate court, whose decree was there brought collaterally in issue, were set forth in the record of said probate court, whereas such decision was based upon the ground, as stated in the language of the opinion, that the bill in equity brought by Simmons' heirs (and not merely the probate record) showed the existence of the two facts necessary to the jurisdiction, to wit: that Simmons died domiciled in Washington parish and that his estate was vacant. In the Bossier case appellants deny and disprove the existence of these two facts.

The question as to whether the judgment of the parish court of Louisiana, granting administration on the estate of Sylvestre Bossier, could be collaterally attacked before this Department for want of jurisdiction in the parish court over the estate of Sylvestre Bossier, is not

entirely free from doubt. Even if it were plain and unmistakable that such attack could be made in this Department upon judgments thus rendered, yet I believe that the better practice would be to require all such attacks to be made in the proper courts of the State in which the judgments are rendered.

For this reason, I direct that all proceedings under the decision now under review be suspended until proper proceedings can be instituted for the purpose of setting aside the judgment granting administration of the estate of Sylvestre Bossier, and until the same is finally determined.

DESERT LAND ENTRY—EXPENDITURE—MAP.

JOHN W. BILL.

The cost of fencing may be properly shown as an expenditure authorized under section 5, of the desert land act of March 3, 1891.

The failure of a desert entryman to file a map showing the plan of contemplated irrigation, as required by section four of said act, may be cured, in the absence of any adverse claim, by subsequent compliance with law, and furnishing a map on final proof showing the character and extent of the improvements.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (C. W. P.)

I have considered the case of John W. Bill on appeal from the action of your office, requiring him to file the map required by the act of March 3, 1891, (26 Stat., 1095); also to furnish new proof of expenditures during the first year from his desert land entry of the NW. $\frac{1}{4}$ of Sec. 9, T. 57 N., R. 86 W., Buffalo land district, Wyoming.

The 4th section of said act requires the entryman to file a map of the land, which shall exhibit a plan showing the mode of contemplated irrigation.

The 5th section provides for the expenditure of not less than \$1 per acre each year on the land, until he shall have expended \$3 per acre in water rights, in permanent improvements, in ditches, etc., and it requires that each year the party file with the register, proof by the affidavits of two or more credible witnesses, that he has expended \$1 per acre, and the manner in which it was expended, and a failure to file such testimony works a forfeiture of the entry, and the 25 cents per acre paid to the government. At the end of the third year he shall file a map or plan showing the character and extent of his improvements, etc.

In the case at bar, the entryman shows \$200 expended for a mile and a half of wire fence, including cost of wire, posts, digging post holes, setting posts and stretching wire, during the first year. Since the appeal was filed, the entryman has filed his proof for the second year, in which he shows \$175 expended for making one mile of ditch to irrigate said land, and for the purchase of water right to reclaim it.

I cannot concur with your office in the opinion that the expenditure for fencing was not a proper expenditure under the desert land law; but clearly the ruling of your office as to the entryman's obligation to file a map of the land at the date of his application to enter it, is correct, but the entryman has evidently acted in good faith, and if he complies with the law and files with his final proof satisfactory evidence of having complied with the law, with a map showing the character and extent of his improvements, there being no protest or adverse claim, his proof will be considered.

Your office decision is modified accordingly.

PRICE OF LAND—COMMON GRANTED LIMITS.

JAMES McVICAR.

Land lying within the common ten mile granted limits of the Chicago, Minneapolis and Omaha, and Wisconsin Central roads, under the act of May 5, 1864, and excepted from the operation of the grant to the latter company by the indemnity withdrawal made under the grant of 1856, is properly rated at double minimum price.

Secretary Smith to the Commissioner of the General Land Office, January 22, 1895.
(J. I. H.) (F. W. C.)

I have considered the appeal filed in behalf of John McVicar, from your office decision of November 2, 1893, denying his application for repayment of the double minimum excess required of him to be paid in completing entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$; SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 27, T. 47 N., R. 10 W., Ashland land district, Wisconsin.

This land falls within the indemnity limits of the grant made by the act of June 3, 1856 (11 Stat., 20), to aid in the construction of the road now known as the Chicago, St. Paul, Minneapolis and Omaha railroad company.

By the act of May 5, 1864 (13 Stat., 66), said grant was increased from six to ten sections per mile and this tract fell within the enlarged granted limits.

By the same act a grant was made to aid in the construction of a railroad now known as the Wisconsin Central railroad. This tract also fell within the granted limits of said grant so that it was within the common ten mile granted limits of the two roads under the act of May 5, 1864, *supra*.

Within said enlarged common limit it has been held that the grant made was of a moiety on account of each of the roads, but as the lands had been previously reserved for indemnity purposes on account of the grant of 1856, they were thereby excepted from the operation of the grant for the Central company, leaving the United States and the Omaha company tenants in common as to the odd numbered sections within such conflicting limits. See 10 L. D., 63 and 147; also 11 L. D., 615.

In the adjustment of the Omaha grant said company was required to make selection of lands within the common limit equal to its moiety, to which it was given full title, the remaining lands being held to apply to the moiety for the Central company's grant, which being defeated by the reservation under the act of 1856, as before stated, were opened to entry. The land in question is a portion of that restored, and in completing entry therefor, McVicar was required to pay at the rate of \$2.50 per acre or the double minimum price.

By the fifth section of the act of May 5, 1864, *supra*, it is provided:

That the sections and parts of sections of lands which shall remain to the United States within ten miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold.

The land in question being within ten miles of the Omaha road, and remaining to the United States, for the reasons before named was properly rated at double the minimum price and your office decision rejecting the application for repayment on account thereof was proper and is hereby affirmed.

The lands involved in the case of Thos. A. Holden (16 L. D., 493) and Ewd. D. McGee (17 L. D., 285), have a different status from those under consideration. In said last named cases the lands fell within the conflicting limits of the grants of different dates, and the earlier grant, on account of which they had been reserved in its satisfaction, was in each case forfeited, and in the act of forfeiture a price was fixed upon the forfeited lands at \$1.25 per acre.

It will therefore be seen that the decisions in said cases can have no application to the state of facts presented in the matter of the application of McVicar under consideration.

HERINGTON v. CAMPBELL.

Motion for review of departmental decision of July 26, 1893, 17 L. D., 129, denied by Secretary Smith, January 22, 1895.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

HAYDEN v. MONTGOMERY.

The right of a purchaser from a railroad company to perfect title, under section 5, act of March 3, 1887, is not defeated by an adverse homestead claim originating subsequently to said purchase and under which no settlement right is shown.

Secretary Smith to the Commissioner of the General Land Office, January 22, 1895.

The plaintiff in the above entitled case presents a motion for review of departmental decision in said case, dated October 9, 1894 (unreported).

Upon a re-examination of the record and the decision complained of in

connection with the various grounds embodied in the motion for review, no sufficient reason is found for granting said motion.

It appears that the lands involved in this controversy were included within the limits of a grant to the Denver Pacific Railroad Company, which, on account of existing entries at the date when said grant attached, did not pass thereunder.

The defendant seeks to acquire title to the land under the provisions of the act of March 3, 1887 (24 Stat., 556). The plaintiff seeks to acquire title to the land under the homestead laws.

The defendant purchased the land in controversy from said railroad company at a time when it was supposed that the railroad had a title to the same under its grant.

The right of defendant, therefore, is superior to the right of plaintiff, unless the plaintiff's claim is covered by one of the provisos embodied in the fifth section of said act of 1887.

It is very clear that the plaintiff's claim is not covered by the first proviso for the reason that her claim did not exist at the date of the sale to the defendant in 1883.

In the decision under review it was adjudged that since she went upon the land on March 4, 1885, she performed no act of settlement under the settlement laws of the United States that would indicate that she intended to claim the land under said laws, other than the mere filing of her homestead application in the local office.

Inasmuch as her claim under the second proviso aforesaid must rest upon settlement rights, and not upon the filing of an application, it is clear that the same is not covered by the last mentioned proviso. The motion is, therefore, denied.

PRE-EMPTION ENTRY—SECTION 2260 R. S.

JAMES CASH.

Under the second inhibition in section 2260 R. S., a person who removes from land of his own, acquired under the provisions of the homestead law, to reside on the public land in the same State, is disqualified as a pre-emptor.

Secretary Smith to the Attorney-General, January 22, 1895.

(J. I. H.)

(J. L. McC.)

I transmit herewith copy of a communication from the Commissioner of the General Land Office, with the inclosures therein referred to, recommending that a request be made for the institution of suit to vacate the patent issued on September 11, 1890, to James Cash under his pre-emption cash entry No. 16, made February 20, 1893, for the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 3, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4, T. 35 N., R. 8 W., Durango land district, Colorado.

The ground upon which said suit is recommended is that the defend-

ant removed from land of his own in the same State when he took up his residence on his pre-emption claim.

In submitting this case for your consideration, I desire to call to your attention the law under which this entry was made and the provision of the homestead law under which Cash acquired title to the land from which he removed, that you may consider the question whether land acquired under the homestead law is of the character of land contemplated by the act of 1841 (Sec. 2260 of the Revised Statutes), which declared that no person should acquire any right of pre-emption under said act who quit or abandoned land of his own to reside upon public land in the same State or Territory.

The pre-emption law contemplated that no one should be entitled to the right of pre-emption who was the owner of land in the same State or Territory in which the right was sought to be exercised, and that, having once exercised the right, he was disqualified from making another pre-emption filing. The homestead law, passed May 20, 1862, provided another mode of obtaining patent to the public land, to wit: by residing upon and cultivating the land for five years. This act provided (Sec. 2299 R. S.) that

nothing contained in this chapter shall be so construed as to impair or interfere in any manner with existing pre-emption rights, and all persons who have filed their application for a pre-emption right prior to the 20th day of May, 1862, shall be entitled to all the privileges of this chapter.

Construing this section the Department has held that the first part of this proviso intended to secure to those who might avail themselves of the benefit of this act the then existing right of entry under the pre-emption law, and the second part of the proviso was intended to secure to those who might avail themselves of the pre-emption law the benefit of the homestead law also. See 4 L. D., 441; 2 Lester, 267.

So it has become a settled rule in the Department that a person who has availed himself of the benefit of the pre-emption law and received the full number of acres allowed by the act can also enter an additional one hundred and sixty acres under the homestead law and *vice versa*, and the only limitation upon this right is that he shall not be permitted to consummate both entries at the same time, for the reason that the law requires residence on each tract during the life of the filing or entry, which can not be maintained on two different tracts at the same time.

Section 2299 of the Revised Statutes, providing that "nothing contained in this chapter shall be so construed as to impair or interfere in any manner with existing pre-emption rights," has been construed by the Department to mean that the consummation of a homestead entry shall not in any manner impair or interfere with the right of the homesteader to purchase an additional one hundred and sixty acres by complying with the provisions of the pre-emption law.

Now, as the pre-emption law requires *bona fide* residence on the tract

from the time of settlement until the making of final proof, a person who had made a homestead entry would be compelled for that time to quit his homestead in order to avail himself of the benefit of the pre-emption law. If such removal is to be construed as working a disqualification of such person to make pre-emption filing, it would seem that such construction not only impairs, but absolutely defeats, the right guaranteed by the law.

I desire also to call attention to the language of the pre-emption law of 1841 (*supra*—Sec. 2260 R. S.), which provides that the following classes of persons,

unless otherwise specially provided for by law, shall not acquire any right by pre-emption under the provisions of the preceding sections, to wit: No person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory.

If the ruling of the Department that a person is entitled to the full benefit of both the pre-emption and homestead laws is the proper construction of the homestead act, then the question arises whether the provision of said act that nothing contained therein "shall be so construed as to impair or interfere in any manner with existing pre-emption rights," is not a special provision by which a person may acquire land under the pre-emption law, although he may have removed from land of his own, in case such land of his own from which he removed was acquired under the homestead act.

I would state, however, that the ruling of the Department has been that, although a person may move from his completed pre-emption entry to consummate a homestead entry, yet he could not move from a homestead entry to which he had acquired title under the laws, to make a pre-emption entry, for the reason that it would be in violation of Section 2260 of the Revised Statutes, prohibiting any person from making a pre-emption entry who moves from land of his own in the same State or Territory. And under the rulings of the Department, which have been adhered to from the date of the passage of the homestead law, the pre-emption entry of James Cash was in violation of law, and proceedings should be instituted to cancel the patent issued to him.

If, therefore, in your opinion, there is no doubt as to the correctness of the departmental decisions, referred to, I request that you cause suit to be instituted to secure a cancellation of Cash's patent, in order that there may be a judicial determination of the question, which is one of much importance in the administration of the land laws and involves the stability of titles acquired under those laws.

DESERT LAND ENTRY—ASSIGNEE—CITIZENSHIP.

FRED. W. KIMBLE.

The word "enter" as used in section 8, of the amendatory act of March 3, 1891, does not mean final entry, but should be construed as applied to the original entry. Under the provisions of said act the assignee of a desert entryman need not show on final proof that he is a resident citizen of the State or Territory in which the land is situated. It is sufficient in such case for the assignee to show that he is a citizen of the United States.

*Secretary-Smith to the Commissioner of the General Land Office, Jan-
(J. I. H.)* *uary 22, 1895.* *(P. J. C.)*

The land involved in this appeal is the N. $\frac{1}{2}$ of Sec. 33, T. 5 S., R. 6 W., Tucson, Arizona, land district.

The record in this case shows that Henry McPhoul filed his declaration of intention, on March 24, 1892, to reclaim desert land described above, under the acts of Congress of March 3, 1877 (19 Stat., 377), and March 3, 1891 (26 Stat., 1095), and on November 18, 1892, he transferred the same to "Fred W. Kimble, of Oakland, Alameda County, California." On April 8, 1893, Kimble, as assignee, presented his own affidavit and those of James C. Kimble and Eliza Kimble, made before the register of the land office at Tucson, Arizona, setting forth the amount of money expended by the assignee during the first year of the entry. The several affiants say in their separate affidavits that they are "of Los Angeles, California." This proof having been forwarded, your office, by letter of August 15, 1893, declined to recognize the assignment, on the ground that the assignee, not being a resident of the Territory within which the land is located, could not make final proof and entry, and inasmuch as he could not do so, the assignee would not be permitted thus to hold the land for three or four years.

Kimble has appealed.

The act of March 3, 1877, declares that it shall be lawful for any citizen of the United States, etc., to file a declaration under oath that he intends to reclaim a tract of desert land by conducting water thereon within the period of three years thereafter. This declaration shall describe the land. It further provides that at any time within the "three years after filing said declaration" upon making proof of the reclamation, and on payment of the sum of one dollar per acre for not exceeding six hundred and forty acres "a patent for the same shall be issued to him." The proviso of this section is "that no person shall be permitted to *enter* more than one tract," etc.

It will thus be seen that the statute designates the first act in the acquirement of desert land as a "declaration" and then provides that he shall not *enter* more than one tract. An examination of the circular of June 27, 1887 (5 L. D., 708), to registers and receivers for their guidance under this act will show that the Department treated the filing of this declaration as an entry of the land. For instance: "desert

land entries are not assignable, and the transfer of such entries, whether by deed, contract, or agreement, vitiates the *entry*. An entry made in the interest" of any other person, etc., is illegal (paragraph 2, page 709). It is conclusive that this language referred to the original entry made by the filing of the declaration, because the Department would not attempt to control in this way the land after final entry.

Again, paragraph 10 (page 711), provides that "persons making desert entries must acquire a clear right" to the use of water, and "a person who makes a desert land entry before he has secured a water right does so at his own risk, and as one entry exhausts his right of entry," etc.

It would seem to be a work of supererogation to discuss this matter for I think an examination of all the adjudicated cases and prior and subsequent instructions issued will show indubitably that the term entry is used uniformly to denote the original act as an entry of the land. (See instructions of July 22, 1885, 4 L. D., 33.)

This act was amended by the act of March 3, 1891, by adding thereto five sections. It is not necessary to consider in this case this amendment generally, but only specifically as applied to the particular question in issue.

In section four it is said "that at the time of the filing of the *declaration* hereinbefore required," etc. Here again the word declaration is used by Congress as descriptive of the initiatory act in acquiring desert land. Further along in the section it provides that "persons *entering* or proposing to *enter* separate sections or fractional parts of sections, may associate together in the construction of canals," etc. Congress seems to have employed the words "entering" and "enter" in the culminating act resulting from the filing of the declaration the same as in the original act; that is to say, an entry is made on the reception of the declaration, the same as if the application for a homestead entry had been accepted, then the land was "entered" and the "entry" is complete for the purpose of segregating the land. If there was any doubt about the interpretation of the language and intent of Congress, the language of the fifth section would be conclusive of it. That section provides that the land shall not be patented "unless he or his assignor shall have expended" at least three dollars per acre in the "necessary irrigation, reclamation and cultivation thereof." This expense may extend over three years at the rate of one dollar per acre per year. Then, "within one year after making *entry* for such tract of desert land as aforesaid, the party so *entering* shall expend," etc.

The 7th and 8th sections of the amendment read as follows:

Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue there-

for to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands but this section shall not apply to entries made or initiated prior to the approval of this act. *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

In section 7 the word "entries" is used as synonymous with "claims." The language used in section 8, that "no person shall be entitled to make *entry* of desert land," is that which seems to have been construed to mean final entry.

The instructions of April 27, 1891 (12 L. D., 405), paragraph 9 (page 406), embodies substantially the same language as that used in the last paragraph of section 8, quoted above, and adds "citizenship and residence must be duly shown." This rule seems to have been intended to apply to those making the initiatory entry, and as such it is in accord with the statute. It appears from the closing paragraph of said circular on page 407, that further instructions and blank forms for submitting final proof were to follow.

The instruction of the same date (14 L. D., 565) was evidently prepared for the blank forms then submitted. Some changes had apparently been made in accordance with suggestions from the Department, and another change is suggested in the interrogatory as to the citizenship of the claimant. The circular then proceeds—

In explanation of this, you say that the inhibition in section 8, of the desert land act as amended, contained in these words: "no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located" applies to the allowing of entry and not to the making of final proof. This construction would be equivalent to saying that a claim under this law initiated by a resident might be completed by a non-resident. This would offer a great incentive to non-residents to procure the filing of claims by residents for the very purpose of evading the restrictions evidently attempted to be imposed by the words quoted above, and I do not think a construction that would bring about this condition ought to be adopted unless the language used precludes any other conclusion. That condition does not obtain here. Parties seeking to obtain title under the provisions of this act must show required qualification at the date of the final proof as well as at the filing of the declaration.

I have caused to be added immediately after the word "born" in question 2 of the deposition of applicant in desert land final proof, the words "and where do you now reside."

The circular as now submitted, and the forms accompanying it, amended in the particular here indicated, seem sufficient and proper to carry out the aims of the statute, and are herewith returned with my approval.

My predecessor in this instruction required the entryman to show at the date of final proof that he was a resident of the State or Territory in which the land he was seeking title to was situated, and holding that a non-resident could not make such final proof.

This holding was emphasized and carried one step further by circular of January 26, 1894 (18 L. D., 31), as follows—

In the matter of the assignment of desert land claims, as recognized by the act of March 3, 1891 (26 Stat., 1095), I have to advise you that this Department, in the construction of said act, holds that the assignee must possess the qualifications required of the original applicant in the matter of citizenship and residence in the State or Territory in which the land claimed is situated. See 14 L. D., 565.

You will, therefore, require the assignee, whenever the assignment of a desert claim is filed in your office, to show the qualifications exacted of an original applicant under the desert land law, in these particulars, and advise him that if he fails, within thirty days from notice, to make the showing required, that his assignment will not be recognized. All assignments filed, however, should be forwarded to this office with due report of action taken thereon.

It will be seen from this more recent amendment that the assignee of a desert land entry must show that he possessed the qualifications theretofore prescribed for the entryman, or original applicant.

After more mature deliberation on this subject, I am disposed to think these instructions take too narrow a view of the statute, and so far as applied to this question of citizenship, are erroneous.

From what has been said hereinbefore in regard to the word "entry", as used in the statute and amendment, it will be seen that it applies only to the original entry, and that the qualifications of those entitled to make entry as prescribed in section 8 does not include the assignees of any original entryman in the matter of making final proof. It will be observed that in section 7 is found the method to be pursued to obtain patent. It provides that at any time within four years upon making satisfactory proof of the reclamation and cultivation of the land to the extent expressed; "that he or she is a citizen of the United States," and on payment of the additional sum, patent may issue "to the applicant or his assigns."

Congress contemplated an assignment of these desert land entries. The object of making this class of entries an exception to the unvarying rule—except as to coal entries—can be readily understood. It is a matter of common knowledge that the effecting of a thorough or sufficient reclamation of desert lands in many instances involves the erection of permanent dams or reservoirs for the purpose of storing the water in the season when at flood, and the construction of canals for carrying the water many miles in length. From these canals lateral ditches must be run to the particular tracts to be irrigated. All this means permanent structures on exact grades to prevent washing; head-gates wherever the lateral ditches leave the main canal, constructed accurately to avoid waste, and so that the quantity of water required may be exactly measured. It is needless to say, perhaps, that all this

requires a greater amount of capital oftentimes than can be furnished by the residents in the desert country. To induce those of our people who have the money to further these great enterprises, Congress wisely provided that these desert entries might be transferred under certain limitations and restrictions so that the assignees who have invested capital in the construction of these waterways might be assured of some compensation for their outlay. If the construction heretofore placed on this act is to prevail, that the assigns must also be resident citizens of the State or Territory where the land is located, it might defeat the object Congress had in view.

It seems that this was not the construction placed upon this statute by your office originally. It is stated that the register at Tucson submitted this question to your office: "Can entrymen assign to any one not a resident citizen of this Territory?" In answer to that question, on April 1, 1892, your office replied: "There is nothing in the desert land law that requires an assignee to be a resident citizen of the State or Territory in which the land is located, and I am of the opinion that this is not necessary. An assignee must show at the time of proof that he is a citizen of the United States." It is stated that this letter was published in the newspapers of Arizona on the authority of the register. Under the authority of this letter people were advised by attorneys and promoters in accordance therewith, and it is stated by counsel that—

millions of dollars have already been expended, and the work is still going on, in the construction of large and substantial dams and capable canals, and the promoters of these enterprises are of necessity bound to look elsewhere to induce men of capital to come in to make something of value grow, something beautiful to bloom, where nothing but sagebrush, greasewood and cacti has met the eye for eternal centuries before.

While this may be a somewhat fancy picture of the zealous advocate, yet it is not difficult to conceive that men have been persuaded to invest capital under your office construction of the statute in this laudable enterprise.

I am therefore of the opinion that the word "enter" as used in section 8 of this statute does not mean final entry, but should be construed as applied to the original entry; that the assignee of an entryman need not show by final proof that he is a resident citizen of the State or Territory in which the land is situated; that it will be sufficient for the assignee to show only that "he or she is a citizen of the United States." The said circular of April 27, 1891, in 14 L. D., 565, and that of January 26, 1894 (18 L. D., 31), are hereby revoked and recalled, in so far as they conflict with what is herein said, and, if deemed advisable, you will prepare instructions in accordance with this opinion.

Your said office judgment is therefore reversed.

I find in the files the affidavits of the original entryman, Arthur B. Black, and Jennie B. Black, made November 18, 1894, in which they swear that the original entryman made the required expenditure dur-

ing the first year of said entry. These affidavits have been filed in this Department since the appeal, and inasmuch as your office has not passed upon them, they are returned for your consideration.

THE GODDARD-PECK GROCER CO.

Motion for review of departmental decision of July 2, 1894, 19 L. D., 15, denied by Secretary Smith, January 30, 1895.

RAILROAD LANDS—SETTLEMENT RIGHT—ACT OF OCTOBER 1, 1890.

SHOW *v.* BRETZKE ET AL.

One who, under the act of October 1, 1890, transfers his settlement right and selects in lieu thereof a tract to which another holds a superior claim, must submit to an order of cancellation on proof of the prior claim.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (F. W. C.)

I have considered the motion forwarded with your office letter of June 13, 1894, for the review of departmental decision of April 16, 1894, ordering the cancellation of the entry by H. A. Bretzke, covering the NW. $\frac{1}{4}$, Sec. 29, T. 49 N., R. 9 W., Ashland land district, Wisconsin, and directing that A. B. Show be permitted to make entry therefor, as applied for.

This land is a part of that appertaining to the unconstructed portion of the grant for the Wisconsin Central Railroad company, which was forfeited and restored to the public domain by the act of September 29, 1890 (26 Stat., 496).

Acting under instructions from your office these lands were formally opened for the allowance of entries on February 23, 1891, and on that day H. A. Bretzke made application under the provisions of the act of October 1, 1890 (26 Stat., 647), to transfer his claim from certain lands within the indemnity limits of the grant for the Northern Pacific Railroad company in the State of Minnesota to the land in question. This application was duly allowed and cash certificate issued for the land in question.

On the following day Show applied to make homestead entry for this land and his application was rejected for conflict with the entry by Bretzke.

On March 20, 1891, he filed an affidavit of contest against the entry by Bretzke alleging his (Show's) prior settlement, upon which a hearing was ordered, the notice being served on the defendant personally on May 26, 1891.

On the day fixed for the hearing Bretzke failed to enter an appearance but one Frank H. Libbey, by attorney, moved to dismiss the case

on the ground that he was a transferee of Bretzke and had not received notice of the hearing. Said motion was overruled and hearing was proceeded with.

Upon the testimony adduced the local officers found in favor of Bretzke, but upon appeal your office reversed said decision and ordered the cancellation of Bretzke's entry.

Upon appeal to this Department the case was considered in the decision now under review, and the decision of your office was sustained. In said decision a motion for rehearing filed on behalf of Libbey, the intervenor, on the ground of newly discovered evidence was considered and it was held: "In view of the fact that this evidence relates to neglect on the part of Show, since the date of said hearing, it can not be seen wherein it affects the finding on the original contest."

In said decision the regularity of the alleged transfer from Bretzke to Libbey was considered, and it was held that the same was not sufficient to give Libbey a standing in the case and that he should not have been allowed to become a party to the record.

The motion for review urges error in the matter of the several holdings made in regard to the alleged transfer of Bretzke's entry, which, however, were unnecessary to the decision under review and will not be further considered.

It will be remembered that Show's contest was based upon the ground of prior settlement and having established this fact he was entitled to make entry as applied for. In order to permit the allowance of his homestead application it was necessary to clear the record of Bretzke's entry, which was ordered canceled.

It seems that Show's subsequent compliance with law has been questioned by Libbey, and this Department is petitioned in the exercise of its supervisory authority, to permit the entry by Bretzke to remain of record pending the determination of future proceedings against Show, for the reason that said entry being a transfer of claim under an act of Congress limiting the time within which such transfer might be made, should it now be canceled, could not be again located.

For this condition Bretzke is alone responsible as he made selection of the land to which his transfer was desired, and having applied for land to which another had a better claim his entry based upon the transfer, must, upon proof of such prior claim, be canceled.

The motion alleges nothing new in so far as the prior claim made by Show is concerned, and said motion is accordingly hereby denied.

DICKINSON *v.* AUERBACH.

Motion for review of departmental decision of January 15, 1894, 18 L. D., 16, denied by Secretary Smith, January 30, 1895.

SCHOOL INDEMNITY—SELECTION—HOMESTEAD ENTRY.

STATE OF OREGON *v.* VIEDERNELL ET AL.

A school indemnity selection should not be allowed to embrace a tract appropriated by a prior uncanceled homestead entry.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895.

I have considered the appeal of the State of Oregon from your office decision of June 7, 1893, holding for cancellation that portion of school indemnity selections of the State of Oregon, described as the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 1, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 2, T. 19 S., R. 31 E., and contained in list No. 22 of said selections, in your office, on the ground that said selections are in conflict with homestead entry No. 867, made by Frederick Viedernell September 14, 1887, in Burns land district, Oregon, said selections being of subsequent date to said homestead entry.

It is urged on the part of the appellant that the selection so made of school indemnity land, should be considered as an attack upon the entry, and is equivalent to a contest. This is urged, not upon any authority of adjudged cases, but it is asserted that applications to make entry have been held to have such character in relation to selections of the same tract, (*Niven v. State of California*, 6 L. D., 439); (*George Schimmelpfenny*, 15 L. D., 549) and that the converse of the proposition must be true.

The cases in which the doctrine is held as above, are those in which *applications to enter* have been made, and not where the entries have been perfected.

The selection in the above cause has been fully made of record, and approved, and the simple question is, whether, it being of subsequent date to an uncanceled homestead entry, it ought to have been permitted to go of record, as aforesaid, without contest or hearing of any kind. I do not think the entryman should be forced to defend his entry in consequence of the improper record of selection of school indemnity land. As it had no right to go upon record while the land described was absolutely appropriated by homestead entry, the record and selection so unlawfully made, should be cancelled.

It appears from the papers accompanying the appeal, that one David Craddock contested the aforesaid homestead entry, but nothing final ever resulted from it, and the entry of Viedernell remains intact.

Your office decision is therefore affirmed.

REPAYMENT—RIGHT OF ASSIGNEE.

ALPHA L. SPARKS.

No right of repayment is acquired by an assignee whose interest in the tract is not obtained until after cancellation of the entry.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (J. L.)

I have considered the appeal of Alpha L. Sparks, (by Jo. G. Crews, his attorney) from your office decision of August 5, 1893, rejecting Spark's application for payment to him of the sum of \$49.90 of purchase money paid by Andrew J. Bright on November 9, 1887, for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 14, T. 17 S., R. 1 W., containing 39.91 acres of land, in Montgomery land district, Alabama.

The papers before me show the following case:

Bright made commutation cash entry No. 21,944 of said land on November 9, 1887, and paid therefor \$49.90, and the further sum of \$2.40 as additional fees; and received final receipt and certificate.

It was subsequently discovered that said land was reported as valuable for coal, prior to the act of March 3, 1883, (22 Stat., 487), and was not subject to entry until after it had been offered for sale.

On June 22, 1889, Bright was advised by your office that his entry was illegal; but that instead of being held for cancellation, his entry would be suspended, pending the offering of said, land at, public sale; and that if said land was not sold when offered, his entry might be considered as an application to enter, of the original date, and that he might then be permitted to make entry thereunder.

In the meantime, on January 14, 1888, Bright and wife conveyed to the Columbus and Western Railway Company a strip of said land one hundred feet wide, for right of way.

On June 15, 1888, Bright and wife conveyed to Alpha L. Sparks eight acres of land, (593 feet square), in the southwest corner of said tract.

On the same day, June 15, 1888, by deed of gift, Bright conveyed to his wife twenty acres of said land, being the N. $\frac{1}{2}$ of said tract.

On May 4, 1891, Bright made application for repayment of his purchase money. Whereupon, your office, by letter "C", of July 20, 1891, cancelled Bright's entry; and reserved his application for the return of the money, for consideration in another letter.

On June 23, 1891, your office instructed the local officers that Bright, having conveyed 28 acres of the land, was entitled to pay for only 12 acres, (or rather, 11.91 acres) unless he could procure a reconveyance from his grantees.

Sparks was unwilling to reconvey the eight acres he had bought. And probably also, the railroad company was unwilling to reconvey its right of way.

Thereupon, Bright and wife, by quit-claim deed, on December 16, 1891, in consideration of the sum of ten dollars, conveyed to Alpha L. Sparks all their right, title and interest in said tract of land. And thereupon, the Commissioner of the General Land Office was requested to return the papers sent by Bright, including his duplicate cash receipt; which request was complied with.

On or about June 23, 1893, Sparks filed an application for the repayment to him of the purchase money paid by Bright; and also sundry papers in support thereof.

On August 5, 1893, your office decided in substance, that Sparks acquired no rights as assignee of Bright's claim for purchase money, under and by virtue of the deed of December 16, 1891, aforesaid, made subsequent to the cancellation of Bright's entry. But that in respect of the eight acres of land conveyed to Sparks by Bright and wife on June 15, 1888, he, Sparks, as assignee in good faith, might receive payment of the purchase money paid for said eight acres upon compliance with the rules and regulations of the Department in that behalf.

I see no error in your office decision, and the same is hereby affirmed.

FINAL PROOF—CROSS-EXAMINATION—RESIDENCE.

LANGFORD *v.* BUTLER.

Ready made final proof submitted before the attesting officer without proper cross-examination should not be accepted.

Residence can not be maintained by occasional visits to the land while the actual home is elsewhere.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (J. L.)

I have considered the case of Frank Langford *v.* Sidney H. Butler on the appeal of the former from your office decision of March 31, 1893, reversing the decision of the local officers, awarding lot 4 to Butler, and holding for cancellation Langford's homestead entry as to said lot 4.

The land involved is lot 4 of Sec. 17, T. 30 N., R. 20 W., containing 41.36 acres Missoula, land district, Montana.

The township was finally surveyed in the field in February, 1891. On June 22, 1891, the survey was approved, and the plat was filed in the local office in July. August 17, 1891, was fixed as the day on which entries, filings and applications would be received.

On that day, August 17, 1891, Langford made homestead entry No. 145 of lots 2, 3 and 4, of Sec. 17, T. 30 N., R. 20 W., containing respectively 50.82, 33.74, and 41.36 acres, aggregating 125.92 acres. On the same day Butler filed his pre-emption declaratory statement No. 18, for lots 6 and 7, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 18, T. 30 N., R. 20 W., and also for the aforesaid lot 4 of Sec. 17; the four tracts aggregating 149.67 acres.

On August 26 (nine days after his filing) Butler gave notice of his intention to make final proof on October 9, 1891, before a commissioner at Columbia Falls, Montana. Langford appeared by attorney, protested against the final proof, cross-examined Butler and one of his witnesses (the other witness refusing to be cross-examined), and called and examined other witnesses.

On November 7, 1891, and before the local officers had passed upon the final proof aforesaid, Langford filed his affidavit of contest as to said lot 4, in Sec. 17, alleging that he—

Settled upon and improved said lot 4, in Sec. 17, long prior to the date of settlement or initiation of any claim to said land by said Butler.

A hearing was had December 22, and 23, 1891. And on November 11, 1892, the local officers jointly recommended—

That the proof of Butler be allowed to stand, and that he be permitted to make entry of the entire tract upon condition that he tender to Langford an agreement in writing to convey to Langford that part (forty acres) of the tract claimed and occupied by Langford; and if he declines to enter into such agreement, then Langford may make entry of the entire tract upon condition that he tender to Butler an agreement to convey that portion of the tract (one acre and thirty-six hundredths of an acre) in dispute, claimed and occupied by Butler. If both parties fail or refuse to make entry upon the terms and conditions herein prescribed, we recommend that the parties be allowed to make joint entry, in accordance with the provisions of Sec. 2274, Revised Statutes.

From that decision Butler appealed to your office. And on March 31 1893, your office reversed said decision, awarded said lot No. 4 to Butler, and held Langford's homestead entry for cancellation as to said lot 4.

Langford has appealed to this Department.

The controversy between Langford and Butler personally, involves only lot No. 4, of Sec. 17, and will be last considered. The rights of the government are paramount.

Langford appears first as a protestant, in pursuance of notice published in behalf of the United States; inviting any person who desires to protest against the allowance of Sidney H. Butler's final proof, or who knows of any substantial reason why such proof should not be allowed, to appear at the time and place named in the notice; and assuring such person that he will be given an opportunity to cross-examine the witnesses of said claimant, and to offer evidence in rebuttal of that submitted by the claimant.

Butler's application to the United States, to make final proof, and purchase the land he had pre-empted, presented as issues to be maintained by him, settlement, improvement, residence and good faith. Langford appeared as protestant, by his attorney, and thereby joined in every issue tendered.

On page 178 of 5 L. D., Secretary Lamar and Commissioner Sparks, addressing all registers and receivers, said: "Claimants and witnesses will be cross-examined in all cases of final proof; and you are

instructed to reject all proofs not accompanied with the required cross-examination;" and they direct attention to the circular of December 15, 1885 (4 L. D., 297), in which, among other things, it is said:

2. Each question in final proofs must be orally asked and answered in the presence of the attesting officer. . . . Ready made proofs presented merely *pro forma* acknowledgment, without verification, cross-examination or evidence of identity, will not be considered such proofs as are required by law.

4. Cross-examination should be directed to a verification of the material facts alleged in the case, and especially to the actual facts of residence and other requirements.

6. Proofs must be taken on the day and before the officer named in the advertisement, and at his office, and between the hours of 8 A. M. and 6 P. M. Proofs taken privately or in secret, or otherwise in substance irregularly, will not be accepted.

The attention of your office is again called to the circular in 4 L. D., 297, in order that every one of the fourteen sections thereof may be strictly observed and enforced. An offer to make final proof is a claim for lands under the laws against the United States, and must not be permitted to degenerate into a perfunctory and flippant proceeding, whether there be or be not a protestant appearing.

In the pending case the officer named in the advertisement certifies: that "the testimony of the final proof of the claimant was submitted to me at 5:30 o'clock, P. M. (October 9, 1891), to swear the witnesses and claimant," *ready-made*; that "John Myers, witness for claimant, after hearing his testimony read, made oath and subscribed to the same;" that "John Gaugner, witness for claimant, after hearing his testimony read, made oath and subscribed to the same;" that "the attorney for the (protestant) thereupon objected to the manner in which said testimony was submitted;" . . . and that "after the cross-examination of Mr. Gaugner had been closed at 7:30 P. M., the Commissioner adjourned taking further testimony until Monday, October 12, 1891, at 10 o'clock A. M."

Afterwards Butler was cross-examined. John Myers, one of his witnesses, refused to submit to cross-examination. Attorney for the protestant called and examined two witnesses, Galen H. Wheeler and Vernon Smith. An application to continue the hearing for ten days to enable the protestant's attorney to secure the attendance of his client, Frank Langford, and Frank Damstrom, both of whom were alleged to be important witnesses for the United States, was denied. And the officer named in the advertisement reported his proceedings and the testimony taken before him to the local officers, who temporarily withheld their judgment.

Said final proofs must be and the same are hereby rejected.

Langford's affidavit of contest filed November 7, 1891, embraced only lot 4 of section 17, a small part of Butler's pre-emption claim. The testimony therein taken and now before me, proves by a decided preponderance that Butler has not been and is not now a *bona fide* resident upon any part of his pre-emption claim; that he is a dealer in real

estate, carrying on his business and residing in the town of Kalispell, about eighteen or twenty miles distant from the land in question; that he visits his pre-emption claim occasionally for the purpose of showing a colorable residence there, while maintaining his actual residence elsewhere; and that he made his filing for speculative purposes. At the hearing Butler did not introduce any testimony, not even his own, in reply to the testimony of contestant's witnesses impeaching his actual residence and good faith.

I therefore am constrained to hold that Langford has the better right to the 41.36 acres of land involved in this controversy.

Your office decision is hereby reversed. Langford's homestead entry is held intact. And Butler's pre-emption declaratory statement is hereby canceled.

RAILROAD GRANT—SETTLEMENT RIGHT.

COCHRAN *v.* FLORIDA CENTRAL AND PENINSULAR R. R. CO.

The general waiver of the company executed June 25, 1881, so far as indemnity lands is concerned, was a waiver of the right of selection in favor of any actual settler who made improvements on the land prior to March 16, 1881. The subsequent absence of the settler from the land would not operate to relieve it from the effect of said waiver, especially where he had returned to the land, and was living thereon, prior to the date of its selection by the company.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895.
(J. I. H.) (F. W. C.)

I have considered the motion, filed on behalf of the Florida Central and Peninsular Railroad Company, for the review of departmental decision of May 13, 1893 (unreported), in the case of William P. Cochran against said company, involving lots 1 and 2, Sec. 5, T. 28 S., R. 24 E., Gainesville land district, Florida.

Said tract is within the indemnity limits of the grant made by the act of June 3, 1856 (11 Stat., 15), under which said company claims, and was selected April 5, 1887, in lieu of certain tracts previously granted as swamp lands.

On February 28, 1889, Cochran applied to enter the land in question, alleging settlement in 1877, against the allowance of which the company protested, and hearing was had.

As a result of said hearing, the opinion sought to be reviewed held that:

Cochran settled upon the land in the fall of 1877, built a house, dug a well, and lived there with his family till the middle of March, 1881, when he left to work elsewhere in order to support his family, until the fall of 1885, when he re-established his residence upon the land with his family, built a new house, and has continued to reside there since, cultivating and improving the land. He raised crops there both before and after his absence. During his absence from the land, from the

middle of March 1881, to the fall of 1885, he left his effects, live-stock and furniture, in charge of John M. Cumbee, who lived $2\frac{1}{2}$ miles from the land. Cochran visited the land occasionally during his absence. He was there in the fall of 1881, once in 1882, and about the middle of the year 1883.

Upon these facts it was held that his claim is protected by the general waiver executed by the company, on June 25, 1881, which is as follows:

In due consideration of all the circumstances, the company has decided to extend the relinquishment or waiver heretofore made to all actual *bona fide* settlers who made improvements prior to the 16th day of March, 1881, upon which date your instructions were issued to the local land officers. The Department can accordingly apply this waiver or relinquishment in its action upon the cases of all actual settlers who shall have entitled themselves to patents. In making this relinquishment, the company reserves the right to select, under the act of June 22, 1874, equal quantities of other land in lieu of tracts embraced in such entries as may be relieved hereby.

The motion is based upon seven grounds of error, the effect of which is that Cochran had abandoned the land prior to March 16, 1881, and that he is therefore not entitled to the benefits of its waiver or relinquishment.

Considerable is said about the act of June 22, 1874 (18 Stat., 194), which is perhaps due to a statement made in the decision sought to be reviewed, to the effect that the lands were, at the date of the company's selection, "otherwise appropriated," within the meaning of the act of June 22, 1874, "under the provisions of which act the said selection was made."

This is error, as the selection was not made under said act, but is a regular indemnity selection, based upon a loss occurring prior to the grant, and all that part of the decision referring to the rights under said act is recalled and set aside.

The only bar to Cochran's settlement was the withdrawal for indemnity purposes, which, while serving to reserve the lands embraced therein from settlement, created no right in the company to any particular tract prior to selection—indeed, prior to the approval of selection previously made in the manner prescribed.

So far as indemnity lands are concerned, then, all that the company could waive was a right of selection, which depended upon a contingency, viz: a loss to the grant within the primary limits.

Whatever the moving cause leading to the relinquishments executed in 1876 and 1881, it is sufficient to say that the company should not now repent of its generosity and seek to restrict the terms of the release.

It is plain that the company intended to waive any claim it had or might acquire to any lands within its limits, in favor of any actual settler who made improvements prior to March 16, 1881. This waiver did not give the settler title, but removed any objection that might be made, on account of the grant, to the acquirement of such title, which must come from the government.

It is true that the release also states that "the department can

accordingly apply this waiver or relinquishment in its action upon the cases of all actual settlers who shall have entitled themselves to patents," but this does not limit the release to those entitled to patents on March 16, 1881, or June 25, 1881, the date of the execution of the release.

The testimony taken at the hearing shows that Cochran is entitled to patent for this land, unless some claim under the grant is a bar thereto, and he asks to be allowed to make entry, to the end that he may make proof in form, as required by the rules and regulations governing such cases, and receive patent for the land. That he had improved the land prior to March 16, 1881, is not disputed, and that he was absent for a time is a matter that does not concern the company.

Will it be seriously contended that the company is a constant contestant, ever waiting for the settler to fail in some particular to comply with the strict letter of the law, and upon proof of the breach to re-assert its claim under its grant? Even if this were so, it would avail the company nothing in the present case, for it could assert its claim only by selection, and to admit the breach, it had been cured and Cochran had been faithfully residing upon the land for two years immediately preceding the company's selection.

It is clear then that the land was not subject to selection on April 5, 1887, when the company filed its list, and the previous decision directing the cancellation of such selection, as to the tract in question, and the allowance of Cochran's application, is adhered to, and the motion is accordingly denied.

DESERT LAND ENTRY—ANNUAL EXPENDITURE—FENCING.

FREDERICK H. WELTNER.

The proof of annual expenditure in permanent improvements upon the land, required under the desert land act of March 3, 1891, may properly embrace money expended for fencing the tract involved.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (E. M. R.)

This case involves the SE. $\frac{1}{4}$ of Sec. 20 and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 29, T. 56 N., R. 83 W., Buffalo land district, Wyoming.

The record shows that Frederick H. Weltner made desert land entry for the above described tract June 17, 1891.

June 18, 1892, Weltner submitted the first year's proof and on December 20, 1892, your office decision was rendered in which it was held that the proof was unsatisfactory, inasmuch as the principal item of expenditure was for fencing the tract, which was held to be unauthorized under the law.

The entry was made under the act of March 3, 1891 (26 Stat., 1095),

entitled "An act to repeal timber-culture laws, and for other purposes," and a portion of section five thereof is as follows:

That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canal and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended.

The evidence shows that during the first year the entryman expended \$475; \$425 thereof being for fencing and \$50 for ditches. The act provides that there may be expenditures "in permanent improvements upon the land." There can be no question that fencing is a permanent improvement and presumably, it is a necessity. The law requires that at the expiration of three years the land shall be reclaimed from its desert character and it further demands that there shall be expended upon the land one dollar per acre each year, but this expenditure may be for permanent improvement in the way of fencing, etc., and the only absolute requirement demanded at the hands of the entryman is that within the time allowed by the act, the land must be reclaimed.

Your office decision states that the map filed does not comply with Sec. 4 of the act. I concur in that opinion. For the reasons stated your office decision is accordingly reversed, but as the map filed is insufficient Weltner will be allowed ninety days in which to file a proper map, as his showing in regard to expenditures is in all other respects satisfactory.

NORTHERN PACIFIC R. R. CO. *v.* BENZ ET AL.

Motion for review of departmental decision of October 9, 1894, 19 L. D., 229, denied by Secretary Smith, January 30, 1895.

RAILROAD GRANT—INDEMNITY SELECTION—ACT OF JUNE 22, 1874.

FLORIDA CENTRAL AND PENINSULAR R. R. CO. *v.* SMITH.

The right of a railroad company to make indemnity selection of a tract under the act of June 22, 1874, is defeated by a settlement right existing at the date of selection.

The right of the settler in such case is not waived by his attempting to secure title to a portion of the land through the company, in the event that his claim is not recognized by the government.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (F. W. C.)

I have considered the appeal by the Florida Central and Peninsular Railroad company *v.* Wm. Smith, from your office decision of August

3, 1892, sustaining the action of the local officers in rejecting the attempted selection by said company of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 12, T. 15 S., R. 19 E., Gainesville land district, Florida, and holding for allowance the homestead application by William Smith presented therefor.

The list containing this tract was tendered by the company on May 2, 1887, the selection being made under the provisions of the act of June 22, 1874 (18 Stat., 194).

The record shows that Smith first made homestead entry of the land on October 26, 1876, which entry was canceled upon relinquishment December 14, 1883, and thereafter entries were made by Moses Simmons and James A. Curry, which were both canceled upon relinquishment, the latter's entry having been canceled on December 6, 1886, upon which date Smith filed pre-emption declaratory statement for the land which is still of record uncanceled.

Your office decision fails to state whether this land has ever been offered, but it is alleged in the company's appeal to have been offered, and if this be so the filing by Smith expired in December, 1887.

Smith failed to make proof under said filing, but on December 3, 1890, he presented an application to make homestead entry for the land and in an affidavit accompanying the same, alleged that he had established residence during the latter part of the year 1881 and that he has since continued to reside thereon.

Upon said allegation of residence hearing was ordered, and from the testimony adduced it appears that Smith first settled upon the land in 1872 and that he has since continued to reside thereon, making valuable improvements, with the exception of two years (1874 and 1875), when, through a mistake in surveying the land, he moved upon the adjoining tract believing that he was upon the land in question.

The company's claim to the land resting upon its selection under the act of June 22, 1874, *supra*, must depend upon the status of the land at the time of the presentation of its list, namely, May 2, 1887. That the land was at that time in the undisputed occupancy and possession of Smith is not questioned, but the company seems to rest its claim upon the ground that a compromise was effected between the company and Smith whereby the company agreed to sell to Smith forty acres, or one subdivision, of the tract in question at the rate of \$2.50 per acre, being the government price, the tract bargained for being the one upon which his improvements were placed.

The company urges that by reason of said compromise Smith should be held to be estopped from making claim to the land under the settlement laws as against the company's selection.

I deem it unnecessary for the purposes of this decision to inquire into the alleged compromise; suffice it to say, that the record shows that Smith had such a claim to the land at the time of the company's selection as would bar selection thereof, under the act of June 22, 1874,

and said selection can not therefore prevent the consummation of his claim under his application made as before stated.

When it is remembered that he has been many years seeking to acquire title to this land and has been so often unsuccessful, it is but reasonable that he should seek to protect himself in the improvements made by bargaining with the company for the purchase of the lands on which he had made improvements, in the event he was unable to secure title from the government, but by so doing he did not invalidate his claim under the settlement laws, and your office decision rejecting the attempted selection of the land by the company is affirmed.

HIGGINS ET AL v. ADAMS.

Motion for review of departmental decision of June 29, 1894, 18 L. D., 598, and for rehearing therein denied by Secretary Smith, January 30, 1895.

TIMBER CULTURE ENTRY—ACREAGE CULTIVATED.

WILLIAM MCNISH.

A timber culture entryman who, through a mistake in measurement, fails to plant and cultivate the requisite acreage, may be permitted to perfect title for the amount of land earned by his compliance with law, and relinquish the remainder.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (J. L.)

I have considered the appeal of William McNish from your office decision of March 27, 1893, in relation to his final proof under his timber culture entry, No. 607, of the NW. $\frac{1}{4}$ of section 13, T. 23 N., R. 11 W., containing one hundred and sixty acres of land, in Neligh land district, Nebraska.

McNish made his entry on April 22, 1879. He made final proof on January 13, 1893, and showed that he had planted in timber, seeds and cuttings only seven and a half acres of land, instead of ten acres, as required by law. With his final proof, he filed his affidavit, stating that in April, 1881, when he planted the first five acres, he procured another person to measure the land then planted, by stepping it off, and was told by said person that he had planted seven and a half acres; and that consequently, in April, 1882, he planted only two and a half acres more, and then thought that he had fully ten acres planted in trees. But he found, when he had the ground measured by the county surveyor, that he had only seven and a half acres of trees planted. He does not state when the survey was made.

McNish's failure to have the ground measured correctly at the proper time, to wit, in the year 1882, was negligence which this Department

can not ignore or condone. But in consideration of his diligent and successful cultivation of timber on seven and a half acres of land, I will follow the precedent set, in the case of the Heirs of Richard K. Lee, reported in 15 L. D., 107. Upon his executing and filing a relinquishment of one of the quarters of the quarter section entered by him, McNish will be permitted to make final entry of, and receive final certificate for the other three quarters of said quarter section.

Your office decision is hereby affirmed.

PRE-EMPTION ENTRY—EXTENSION OF TIME FOR PAYMENT.

MARTIN HENSLEY.

The limit of time, under the joint resolution of September 30, 1890, to which an extension of time for payment may be granted, is one year from the expiration of the statutory life of the filing in question.

A pre-emptor who fails to make payment within the period granted by an order of extension can not thereafter be permitted to perfect his claim in the presence of an intervening adverse right.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895.
(J. I. H.) (F. W. C.)

I have considered the appeal of Martin Hensley from your office decision of February 20, 1893, denying his application to be permitted to make payment under the pre-emption law for the NE. $\frac{1}{4}$, Sec. 18, T. 10 N., R. 19 W., Grand Island, Nebraska, land district, on account of the adverse interest of James Hatter to the same land, under his homestead entry made therefor on January 25, 1893.

It appears that Hensley filed declaratory statement No. 9170 for said tract on June 19, 1888, alleging settlement the preceding day, and that he offered proof under said filing on July 28, 1891, which was accompanied by his corroborated affidavit requesting an extension of time within which to make payment on account of failure of crops, under the provisions of the joint resolution of September 30, 1890 (26 Stat., 684). Said resolution provides that upon proper application, the Commissioner of the General Land Office "is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same became due."

Hensley's filing expired March 18, 1891, and it would seem that the latest time to which extension could be granted, within which to make payment under said joint resolution, would have been March 18, 1892.

Hensley's application for extension was considered in your office letter of October 22, 1891, and he was granted an extension thereby until July 28, 1892.

On September 10, 1892, the local officers reported that Hensley was yet in default in the matter of making payment, and that one H. W.

Cox had applied to enter said tract, which application was held in abeyance waiting your office instructions.

On the 26th of that month you advised the local officers that on account of Hensley's default they should hold the land subject to disposition to the first legal applicant. Acting thereunder they permitted Cox to make entry on October 1, 1892, which he relinquished on January 25, 1893, and Hatter made homestead entry as before stated.

On February 1, 1893, Hensley filed corroborated affidavit in which it is set forth that he is an old man—ninety-two years of age—unable to read or write, and that upon receiving notice of the granting of his application for extension he was forced to consult someone who could read, who informed him that he had been granted an extension to October 5, 1892, within which to make payment as required by the pre-emption law.

This is the application that was considered in your office decision of February 20, 1893, in which it was held that the showing made could not be considered as sufficient for granting his request to be allowed to then make payment, an adverse right to the entry having intervened by Hatter.

It is from this action that he has appealed to this Department. Said appeal does not appear to have been served upon Hatter and might, for that reason, be denied, but waiving such defect this Department, on the merits, is unable to afford him any relief.

As before stated, it would seem that the limit of time to which an extension might be granted, under the joint resolution of September 30, 1890, would be one year after the time that such filing would have expired under the pre-emption law. It seems, however, that Hensley was granted, by your office, an extension of more than four months after such time and that he failed, even within such time, to make payment as required by law, his only excuse being that others, who read the notice, informed him that he had until October 5, 1892, within which to make such payment.

It is a noticeable fact that he failed to tender the payment even within such time, for it was not until February 1, 1893—nearly four months thereafter—that he made application to be permitted to make payment as required.

While it may be a particular hardship to award the land to Hatter in its improved condition, due to the energies of Hensley, yet this Department, under the law in the case, is unable to grant him any relief in the premises. His only chance for relief would be to secure the relinquishment of Hatter's entry.

Upon the record, as made, I must affirm your office decision.

DILLON ET AL. v. HEFFERMAN.

Motion for review of departmental decision of October 9, 1894, 19 L. D., 170, denied by Secretary Smith, January 30, 1895.

SUPERVISORY AUTHORITY—NEGLIGENCE.

HOPELY ET AL. v. MCNEIL ET AL.

The supervisory authority of the Secretary of the Interior may be invoked to prevent a wrong or fraud, but not to relieve parties from the consequences of their own negligence.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (I. D.)

The plaintiffs in the case of Alfred L. Hopeley *et al.* v. John McNeil *et al.*, filed their petition invoking the supervisory power of this Department for a hearing in this case after the same had been refused by your office letter of May 28, 1892, involving mineral entry No. 131 known as the Center Lode in Pitkin county, Garfield land district, Colorado.

November 18, 1885, McNeil *et al.*, the defendants herein, located the New Scheme Lode claim running from its west end line east about twenty degrees north to its east end line, and lying a few yards north of the north end line of what was then known as the Best Lode claim.

October 28, 1886, they amended their location and changed the boundaries and the name of the claim to Center Lode, and the survey No. 4671 of May 2, 1887, of that amended location shows that the new location runs nearly north and south, embracing about one-half of the New Scheme Lode and over two-thirds of the claim known as the Best Lode that had been located and filed prior to such amendment.

September 5, 1887, after legal notice, the defendants made mineral entry No. 131, Glenwood series, Colorado, without protest or adverse claim against it.

December 17, 1888, the owners of the Best claim filed a protest against the amended survey and entry of the Center claim because of conflict with the prior Best claim.

April 28, 1890, your office dismissed the protest and denied a hearing without considering the merits, but on the ground that the charges were not corroborated and that no adverse claim had been filed.

April 14, 1892, a second contest was filed by the same parties charging that no work or improvements had ever been put upon the Center Lode claim; that the amended location was made in fraud of the prior rights of the Best Lode claimants and various other illegal acts and things which, if true, should have defeated the entry; and alleging that they were misled in the matter and failed to examine the new location plat and survey, because said McNeil falsely reported to them that the

new location did not effect the Best Lode claim and that for that reason and because the boundaries of the Center Lode claim were never marked on the ground, they paid no attention to it and did not protest or file any adverse claim. This second protest was duly verified and accompanied by a number of corroborated affidavits and asked for a hearing.

May 2, 1892, your office dismissed this second protest and refused the hearing on the ground that the charges contained therein were the same as had been passed upon in the protest of 1888. Afterward a motion for review was filed and your office letter "N" of May 28, 1892, refusing the motion for review says:

No new facts are presented with said motion for review. The claim that the amended location of the Center claim changing its boundaries (being a re-location of the New Scheme) misled the Best claimant and that they were prevented from filing an adverse claim by fraudulent representations by John McNeil as to the conflict, being off-set by the fact that Wm. Patterson, one of the protestants, joined in the amended location referred to and thereafter deeded to said McNeil his one-third interest in the New Scheme Lode amended and called the Center Lode.

But the protest and motion for review shows that McNeil's false representations as to the new boundaries were made to Patterson and in fact deceived him so that he deeded his one-third interest in the Center without knowing that it then covered about two-thirds of the Best Lode in which he also had an interest.

The second protest both in substance and in form was sufficient to authorize a hearing.

June 1, 1892, the protestant filed a petition for certiorari, which this Department denied on August 18, 1892.

The protestants thereupon filed a motion for review of the decision denying the certiorari, which, on November 19, 1892, this Department overruled.

December 1, 1892, protestants filed their petitions in this Department invoking the exercise of its supervisory power to the end that a hearing may be granted and opportunity given to make good the several charges.

While these charges and the circumstances appearing in the record allege fraud on the part of McNeil, and those privy to the amendment of the New Scheme claim, so as to cover a large part of the Best Lode claim, it also shows gross negligence and carelessness on the part of the protestants. They knew of the amended survey, a change in the name and a change in the boundaries of a claim lying originally within a few yards of their own northern boundary and the notices by posting and publication were according to law.

It was their evident duty to see what the changes were, and to accept the statement of an interested party and neglect to use the simply obvious means of knowing the truth, is such laches as does not appeal strongly to the conscience of the supervisory power that is in

the nature of equity jurisdiction. That power may be invoked to prevent fraud but not to relieve parties from the consequences of such gross negligence of their own rights and duties in relation thereto as this case presents.

The petition for a hearing is therefore denied.

PRACTICE—CERTIORARI—APPEAL—NOTICE OF DECISION.

PORTER v. BURNS.

The writ of certiorari will not be granted where the right of appeal is lost through failure of the applicant to assert the same within the period prescribed by the rules of practice.

Where notice of a decision by the General Land Office is given to resident counsel a copy of the decision is not required to be served.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (E. W.)

Your office letter of transmittal, dated November 17, 1894, conveys an application of plaintiff for the writ of certiorari, made on November 10, 1894.

The land involved in the controversy is the SE. $\frac{1}{4}$, Sec. 21, T. 21 N., R. 4 E., Helena, Montana, land district.

It appears that the plaintiff had applied to contest the cash entry of the defendant, and that on June 29, 1894, your office denied the application, notice of which decision was served upon plaintiff's attorney on the same day.

The applicant filed an appeal from said decision in the local office on September 19, 1894, and for the reason that the same was not filed within the time prescribed by the rules of practice, your office declined to forward it to the Department.

It is manifest that said appeal was filed too late under the provisions of rules 86 and 87 of practice.

In the case of *A. B. Cook* (11 L. D., 78), it is held that writ of certiorari will be denied if, from the application therefor, it appears that the applicant's appeal, if before the Department, would be dismissed. When measured by the rules above stated the application in this case seems to contain that defect, and, for that reason, should be denied.

It is held in the case of *Thompson v. Shultis* (12 L. D., 62) that the writ of certiorari will not be granted where the right of appeal is lost through failure of the applicant to assert the same within the period prescribed by the rules of practice. A similar ruling is made in 13 L. D., 478; likewise in 14 L. D., 154. It is manifest that the application should be denied for the reason set up in the rulings above quoted.

Rule 106 provides that notice to one attorney in the case shall constitute notice to all counsel appearing for the party represented by

him, and notice to the attorney will be deemed notice to the party in interest, and where service is made on resident counsel, copy of the decision is not required to be served. The notice, therefore, in this case was sufficient, notwithstanding it may be true, as set up in plaintiff's application, that said notice contained no copy of the decision.

There being no reason shown why the appeal was not filed in time, the writ of certiorari is denied.

RAILROAD GRANT—INDIAN RESERVATION.

NORTHERN PACIFIC R. R. CO. v. HAYNES.

Lands within the Bitter Root Valley and above the Loo Lo Fork, as shown by the approved diagram of said valley, are within the reservation created by the Indian treaty of July 16, 1855, and therefore excepted from the subsequent grant to the Northern Pacific.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1895. (F. W. C.)

I have considered the appeal by the Northern Pacific Railroad company from your office decision of August 28, 1893, holding that lot 4, SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ Sec. 3, T. 10 N., R. 20 W., Missoula land district, Montana, embraced in the pre-emption cash entry by Justin P. Haynes, was excepted from the grant for said company.

Your office decision rests upon the ground that this land is a part of that withdrawn in accordance with the treaty made with the Flat-head Indians, July 16, 1855, and ratified by the Senate March 8, 1859 (12 Stat., 975), being within the Bitter Root Valley above the Loo Lo Fork of the Bitter Root River.

The company's appeal urges that this land is not within the reservation made on account of said treaty.

In departmental decision of February 19, 1894 (19 L. D., 532), in the case of said company against Cyrus Eberhard, it was held that lands within the Bitter Root Valley and above the Loo Lo Fork of the Bitter Root River, were excepted from said company's grant, and for the purpose of defining clearly the valley referred to, your office was directed to compile from the records a diagram which was accordingly done and approved April 14, 1894.

Said diagram shows the land in question to be within the Bitter Root Valley and above the Loo Lo Fork, so that it was within the reservation made under the treaty named and, consequently, excepted from the railroad grant.

Your office decision is affirmed.

BARDEN ET AL. v. NORTHERN R. R. Co.

Motion for review of departmental decision of October 9, 1894, 19 L. D., 188, denied by Secretary Smith, January 30, 1895.

SOLDIERS' ADDITIONAL HOMESTEAD—POWER OF ATTORNEY.

J. S. PILLSBURY ET AL.

A soldier's additional homestead entry made under a certificate of right and power of attorney after due notice of the illegality of the certificate, and fraudulent character of said power, and subsequent to the exercise of the soldier's right in person, is invalid, and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, January 31, 1895. (W. M. B.)

I have considered the appeal of J. S., George A. and Charles A. Pillsbury, transferees, from your office decision of September 8, 1893, in the case of *ex parte* Sanders P. Perry, wherein is held for cancellation soldier's additional homestead entry No. 7797, final certificate No. 1597, made December 30, 1892, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 154 N., R. 26 E., 120 acres, Duluth, Minnesota, land district.

The material facts disclosed by the record will be stated briefly, and in the order the events transpired, as near as may be requisite to a clear understanding of this case.

The right to make entry of the land in question was, it seems, based upon a certificate of right issued March 12, 1883, in the name of Sanders P. Perry, but by the means and through authority contained in a fraudulent power of attorney held by one J. S. Pillsbury.

It also appears that said certificate of right, though obtained upon a proper application and affidavits executed by said Perry, was issued without his knowledge or consent, and that the papers—application and affidavits—upon which said certificate had been issued were gotten out of his possession in some way unknown to him, and improperly made use of, without his authority or knowledge.

Perry testifies that he is not acquainted with J. S. Pillsbury, of Minneapolis, Minnesota, or the tract of land in controversy, but that about the year 1890 he (Pillsbury) wrote him, stating that he held a power of attorney from him (Perry) authorizing the location of a soldier's additional homestead, and alleging that said power of attorney was defective, and requested that a new power of attorney be executed by him, whereupon he wrote Pillsbury, in reply thereto, that the power of attorney claimed to be held by him (Pillsbury) was fraudulent, and that he did not intend to correct a fraud.

Subsequent to the notification given Pillsbury by Perry as to the fraudulency of said power of attorney, it appears that by your office

letter "C" of November 8, 1892, notice was directed to be given J. S. Pillsbury, of Minneapolis, Minnesota, who still held the certificate of right issued in Perry's name, to show cause within thirty days why said certificate of right should not be adjudged fraudulent.

Said Pillsbury failed to make the required showing, and on December 30, 1892, with the certificate of right and power of attorney held by him located and made entry of the land above described, and now in dispute.

The record discloses the fact that Sanders P. Perry, subsequent to notifying J. S. Pillsbury of the fraudulency of the power of attorney in his possession, and more than a year prior to the entry, made by said Pillsbury, had, on November 27, 1891, in person, made soldier's additional homestead entry No. 1617, final certificate No. 452, for lot 8, Sec. 1, T. 6 S., R. 30 E., and lots 6 and 7, Sec. 6, and lot 1, Sec. 7, T. 6 S., R. 31 E., 119.02 acres, Tucson, Arizona, land district, thus exhausting his additional homestead right under the law, as he had previous thereto, on March 30, 1868, at Booneville, Missouri, made homestead entry for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 36 N., R. 23 W., containing 40 acres, passed to patent.

Upon the allegations made by Perry relative to the fraudulency of the entry made by Pillsbury at Duluth, Minnesota, a hearing was ordered respecting the validity and genuineness of the application and affidavits purporting to have been executed by Perry, upon which certificate of right was issued, and more particularly the validity or fraudulency of the power of attorney held by Pillsbury from Perry.

Upon the evidence deduced at the hearing, by office decision above mentioned, you held the certificate of right issued in Perry's name, as well as the entry made thereunder, for cancellation, and that the entry made by Perry at Tucson, Arizona be allowed to stand in full satisfaction of his additional right.

Pillsbury was put on notice by Perry as to the fraudulent nature of the power of attorney held by him, and by the General Land Office respecting the invalidity of the certificate of right in his possession, previous to the making of the entry in question by the mailing of notice to him to that effect, and it is but fair to presume that he received them.

Perry had repudiated the power of attorney held by Pillsbury, by informing him of the character of the same, and also the certificate of right theretofore issued, by filing on January 8, 1886, his affidavit in your office charging that certificate of right was secured by fraudulent means, and requesting that a new certificate be issued to him in lieu thereof.

Any assignment at that time of the certificate of right held by Pillsbury was without legal effect, and necessarily void. Perry having exhausted his additional right by the said entry at Tucson, Arizona, as stated, on November 27, 1891, was not entitled to a second additional

right of entry, and an entry made thereafter, whether in person or by another, under power of attorney, with certificate of entry, was in direct contravention of both the spirit and the letter of the law then existing, and therefore invalid.

In view of the facts and upon the grounds herein stated, and for the further reason that I find no error in your said office decision of September 8, 1893, the same is hereby affirmed.

APPLICATION TO ENTER—REJECTION—APPEAL.

McINTURF v. GLADSTONE TOWNSITE.

An application to enter properly rejected does not operate to reserve the land covered thereby, even though an appeal is taken from the order of rejection.

Secretary Smith to the Commissioner of the General Land Office, January 31, 1895. (F. W. C.)

I have considered the appeal by James B. McInturf from your office decision of August 4, 1893, sustaining the action of the local officers in rejecting his homestead application covering the NW. $\frac{1}{4}$, Sec. 24, T. 104 N., R. 72 W., Chamberlain land district, South Dakota.

The tract in question is a part of the Great Sioux Indian reservation which was opened to settlement by the proclamation of the President February 10, 1890. Just prior to the opening, to wit, on April 1, 1890, the Commissioner directed that the Miller surveys within the newly opened Sioux reservation be ignored and that no entries be allowed based upon such surveys, as new surveys had been ordered to be made.

On April 28, 1890, McInturf tendered his application under consideration alleging settlement February 12, 1890, which application covered a tract within the Miller surveys, and for that reason the local officers refused to receive his application, treating the land as unsurveyed.

It also appears that this tract was embraced within the limits of the townsite declaratory statement filed for Sherman City on April 3, 1890. In said declaratory statement settlement was alleged February 10, 1890. Said townsite application was at first rejected, but subsequently, upon application of the townsite authorities, the action was reconsidered and the case set for hearing, upon the townsite's application, for June 10, 1890.

In reporting upon the rejection of McInturf's application the local officers referred to the application made under the townsite laws for Sherman City and for that reason it would appear that no action was taken at the time upon McInturf's appeal, the result of the hearing upon the townsite's application being awaited by your office.

It seems that report was called for as to the result of said hearing in your office letters of June 24, 1892, and April 1, 1893, to neither of which has any response been made.

In August, 1891, a plat of the new survey of the township in question was filed and under said survey said NW. $\frac{1}{4}$ is designated as the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 3 and 4.

Due notice of the filing of said plat appears to have been given and the local officers permitted Mary E. Brown to make homestead entry of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section; Carrie C. Peterson to make entry of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, and E. M. Lichtenstein, guardian, to make entry of lot 4 of said section.

Due to inadvertence no memorandum appears to have been made upon the tract books of your office as to the pendency of McInturf's appeal, so that upon completion of the entries by Brown, Peterson and Lichtenstein the same were regularly examined in due course and passed to patent; so that the entire tract covered by McInturf's application, except lot 3, has passed beyond the jurisdiction of this Department.

The townsite application for Sherman City appears to have been from time to time reduced by relinquishment, and afterward to have changed its name to the townsite of Gladstone, the application being finally reduced to lot 3 of Sec. 24, being the only remaining tract covered by McInturf's application which is yet within the jurisdiction of this Department.

The townsite has made cash entry for said lot, the certificate being dated July 14, 1893.

In his appeal McInturf complains greatly of the action of the local officers and your office in passing to patent entries covering part of the land embraced in his application made at a date subsequent to the presentation of such application, but for the disposition of said appeal it is necessary to further consider the matter of the allowance and patenting of said entries.

In the decision in the case of Richard L. Burgess (18 L. D., 14) it was held that no rights are acquired under an application to enter that is presented and properly rejected. In other words, that an application properly rejected, even though an appeal is taken therefrom, does not serve to reserve the land embraced in said application. That the local officers acted in accordance with directions duly given by your office in rejecting McInturf's application can not be questioned, and as the appeal does not question the authority of your office to disregard and ignore the survey made by Miller and order a new survey of the land, I must affirm your office decision and McInturf's application will stand rejected.

In this connection I might note that in support of the townsite appeal affidavits are furnished tending to show that the alleged settlement by McInturf was made merely as one of the occupants of the contemplated townsite and consisted merely in the building of a shanty of little value which was soon afterward removed, and that he did not at the time of the building of the shanty, nor since, ever take up a residence upon the land in question.

MILITARY BOUNTY LAND WARRANT—CERTIFICATE OF LOCATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington D. C., February 2, 1895.

Registers and Receivers of United States District Land Offices.

GENTLEMEN: Attached hereto is a copy of the Act of Congress, approved December 13, 1894, entitled "An Act to provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the Act approved June second, eighteen hundred and fifty-eight."

Under previously existing laws the said military bounty land warrants were locatable on any land subject to sale at ordinary private entry, and also in payment of pre-emption claims or in commutation of homestead entries, even where the same embraced unoffered lands which, being unoffered, were, therefore, not subject to private entry. See pages 6 and 7 of the [general] circular of February 6, 1892, article headed "Warrant Locations."

The same was the case with scrip issued under the third section of the act of June 2, 1858. See page 8 of the same circular, article headed "Private Land Scrip Locations."

The act of December 13, 1894, "in addition to the benefits now given thereto by law," provides that said warrants and said scrip may be located in certain other classes therein specified, viz:

In the payment, or part payment, for any lands entered under the desert land law of March 3, 1877, and the amendments thereto; in payment, or part payment, for lands entered under the timber-culture law of March 3, 1873, and the amendments thereto; in payment, or part payment, for lands under the timber and stone law of June 3, 1878, and the amendments thereto, and in payment, or part payment, for land sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

This act does not change existing law or regulations as to the location of such warrants or scrip upon lands subject to sale at private entry, or in payment for pre-emption claims or commutation of homestead entries, but in such cases the instructions on pages 6, 7, and 8, circular of February 6, 1892, will still apply.

In reference to the four classes of entries specified in the act of December 13, 1894, you are advised that one or more warrants or certificates of location are receivable in payment, or part payment, for a tract of land entered under either of the laws designated, at the rate of \$1.25 per acre upon the expressed value of the warrants or certificates of location. If the amount of money due on such entry exceeds the face value of the warrant or certificate of location at the rate of \$1.25

per acre, the entryman must pay for the excess in cash, but if the face value of the warrant or certificate of location exceeds the amount due on such entry, the claimant must take the tract in full satisfaction of said warrant or certificate of location.

As a basis for patent you will issue the regular receipt and certificate in each class of entry, viz: in desert land entries, forms 4-143 and 4-200, and in the other classes designated, forms 4-131 and 4-189, noting thereon the manner of payment.

In initiating an entry under the desert land laws, payment may be made in money to the amount of twenty-five cents per acre, as required by previously existing law, or if preferred, warrants or scrip may be tendered as payment, and if the face value of such warrant or scrip exceeds the amount of money due in initiating said entry, credit may be given for any balance to be applied to final payment when final proof has been made. In this event you will make such notes on your records as will indicate such credit, giving the number and acreage of the warrant or scrip used, and in issuing final papers refer thereon to such credit, collecting any balance due in cash, warrants, or scrip. A notation should also be made on your joint certificate (form 4-199) as to such location and credit.

Where such warrants or scrip are tendered as payment by other than the party to whom issued, you will require evidence that the entryman is the heir or legatee of the party to whom issued, or see that said warrant or certificate of location has been duly assigned in accordance with circulars of July 20, 1875, and February 13, 1879.

No fees are required to be paid where warrants or certificates of location are used under this act, the same being regarded as the equivalent for money to the extent of their value at the rate of \$1.25 per acre, and the local officers will receive from the United States Treasury their commissions upon the surrender thereof as in the case of entries made with actual cash.

When located each warrant or certificate of location must be relinquished by the legal owner thereof after the following form, viz:

I (or we) do hereby relinquish to the United States the within military bounty land warrant or certificate of location in payment (or in part payment as the case may be) of the (here describe the tract), located in the name of ———, at the land office at ———, this day of ———, 189 .

Witnesses: C. D.

E. F.

(Signed) A. B. [SEAL.]

In their monthly abstracts the register and receiver will designate the entries in which warrants or certificates of location are used in payment, and will show the balance, if any, paid in cash. The receiver in his monthly account current will debit the United States with the amount of such warrants or certificates of location, and in his quarterly accounts will specify each entry in which such warrants or certificates

of location are used in payment giving the number and acreage of the warrant or certificate and date of the act under which issued and the amount for which they are received, and debit the United States with the same.

Such warrants or certificates of location received in payment for lands sold must be forwarded to this office with your monthly account current for the month in which they are received, and must be designated in the receiver's letter of transmittal by number and acreage of each warrant or certificate of location, date of the act under which issued, amount for which received, and the register's and receiver's number of the entry in each case.

It may also be added that, under said act, no warrant or certificate of location can be used in payment for any lands which have been purchased from any Indian tribe within ten years last past, neither can they be used in payment for lands ceded to the United States by any Indian tribe where such lands are to be disposed of for the benefit of such Indian tribe.

Very respectfully,

Approved:

HOKE SMITH, *Secretary*.

S. W. LAMOREUX,
Commissioner.

[PUBLIC—No. 2.]

An Act to provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the Act approved June second, eighteen hundred and fifty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the benefits now given thereto by law, all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the Act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert land law of March third, eighteen hundred and eighty-seven, entitled "An Act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An Act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

Approved, December 13, 1894.

12781—VOL 20—7

FOREST FIRES—HOMESTEAD—BURNED TIMBER ENTRY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 2, 1895.

Registers and Receivers, United States District Land Offices, in Wisconsin, Minnesota, and Michigan.

GENTLEMEN: Your attention is called to the Act of Congress, approved January 19, 1895, entitled "An Act for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan," a copy of which is hereto attached.

The first section provides for an extension of time of two years within which to make final proof, and excuses temporary absence for any period within two years from the date of the act in all cases where any homestead settler, in your respective districts, was compelled to leave the land settled upon by him because of the prevailing forest fires of the summer and autumn of 1894, and by reason of the destruction of buildings or other property by such fires. The same relief is extended to the heirs of any settler who perished by such fires. Any settler desiring to receive the benefit of these provisions will be required to file in the district land office having jurisdiction over the land embraced in his or her claim an affidavit corroborated by two parties setting forth the number of the entry, if one has been made, and the description of the land; the date of settlement upon the land; the amount and character of the improvements placed thereon; the character and extent of the damage to the settler's property caused by the fire; the date when the same occurred; whether or not the party was thereby obliged to leave the claim, and such other facts as may be relied upon as bringing the party within the scope of the act. Where a homestead settler perished by such fires, the heirs (*i. e.*, the successors to the right under the homestead law, if they desire to receive the benefit of the provisions of said section), or one of them, will be required to furnish evidence consisting of the affidavit of the respective claimants, or, if a minor, of his or her guardian, corroborated by two witnesses, setting forth the number of the entry, if one has been made, and the description of the land; the date of the settlement under which they claim; the character and value of the improvements, and the circumstances attending the death of the settler. The affidavits of the claimant and his corroborating witnesses may be made before any officer authorized to administer oaths using a seal.

Upon receipt of the required affidavits, you will forward the same to this office, with your joint recommendation in regard to the case. Should the evidence be found satisfactory you will be so advised,

whereupon you will make such notes upon your records for your future guidance as will indicate that the parties are entitled to the benefits of the provisions of the first section of the act, and in these cases you will not issue the usual notice of the expiration of time within which to make proof until *ten* years from the date of the entry, and no contest for abandonment or non-compliance with the law will be allowed against any of the entries until after the expiration of two years from the date of the act. Entrymen temporarily absent for any time within two years from the date of the act will not be required to show any additional period of residence when they make *final* proof, because of such absence, as the act explicitly directs that such absence shall be deemed constructive residence.

Parties coming under the act whose claims rest upon settlement alone are not relieved from the necessity of making their original homestead entries as heretofore required by the law and regulations in order to protect their settlement rights.

The second section provides that homestead settlers whose property was destroyed by such forest fires, or in case the settler perished by the fire, then his or her heirs, or in other words, the successors to his or her homestead right, as defined in section 2291 R. S., may upon satisfactory proof of compliance with the law upon the part of the settler, to the date of the fire, and, upon payment of the minimum price under existing statutes, receive a patent for the land embraced in the claim of such settler. The procedure in such cases, where the original entry has been made, will be the same as is now required in making homestead proof, except that compliance with the law need be shown only to the date of the fire, and, in addition, proof will be required as to the date of the forest fire and the extent of the damage done to the claimant's property thereby, or, where the settler has perished by the fire, proof as to the time and manner of his death. The payment required to be made for the land is the "minimum price under existing statutes," which in ordinary commutation of homestead entries under section 2301, R. S., is \$1.25 per acre, except where the lands are within the limits of railroad land grants and thereby enhanced in price to \$2.50 per acre, and in other cases such amount as is required by any special laws which may govern the disposal of the specific tracts of land.

You will make no change in your method of reporting these entries, but will be governed in each case by the instructions heretofore issued, should there be any entries embracing land of a special character.

In all cases where parties intend to avail themselves of the benefit of the said second section under claims resting upon settlement alone at the time of the fire, they will be required, when they apply to make the original entry, if such application is not made within three months of the date of the settlement, to file affidavits explaining why such entry had not been made sooner, and when parties whose entries have been made since the date of the fire submit proof, as herein required for the purpose of perfecting title to their claims, under the provisions

of the said section, you will forward the proof submitted to this office for consideration and withhold the cash certificate until advised that such proof is satisfactory to this office.

Section 3 provides for cases in which the forest fires only partially burned the timber on the homestead, and the settler may desire to purchase only a portion thereof, retaining the remainder to be perfected under the general provisions of the homestead laws.

In such cases, and when the quantity of timber burned does not exceed seventy-five thousand feet of merchantable green timber, the entryman may file with the register and receiver of the district in which his claim lies a sworn statement setting forth the fact that the timber on his claim was destroyed or injured by the forest fires during the summer and autumn of 1894, giving a description of his entry, the date and number thereof, and a description of each of the smallest legal subdivisions of his claim upon which the green timber has been injured or destroyed by said fires, together with an estimate of the amount of such timber so injured or destroyed upon each of said smallest legal subdivisions. Also that he has complied with the requirements of the homestead law up to date. This statement must be corroborated by two witnesses who have actual knowledge of the conditions existing on the claim. The entryman must designate which of the legal subdivisions of his claim on which the timber was burned he desires to purchase under this act, and with his application to purchase, and sworn statement above required, he must tender the necessary amount of money to complete the purchase, at the minimum price per acre.

Upon the presentation of the above-required application and sworn statement, together with the purchase money, if the same be found satisfactory to the register and receiver, they shall thereupon issue the ordinary cash entry certificate and receipt, giving them current numbers in the regular cash series. On the margin of the certificate, receipt, and duplicate receipt there shall be indorsed in red ink: "Burned timber entry, Act of January 19, 1895."

On the back of the duplicate receipt there shall be indorsed the following license or permit to cut the burned timber:

The within-named entryman having complied with the regulations prescribed under the act of January 19, 1895, entitled "An Act for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan," is hereby permitted to cut and dispose of the burned timber on that portion of his homestead entry described in this duplicate receipt.

Date _____

Register.

Receiver.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH, *Secretary.*

[PUBLIC—No. 23.]

An Act for the relief of homestead settlers in Wisconsin, Minnesota, and Michigan.

Whereas during the summer and autumn of eighteen hundred and ninety-four extensive forest fires prevailed in northern Wisconsin, Minnesota, and Michigan, resulting in the death of many homesteaders and their families, the destruction of their property and effects, and of much of the green timber growing upon them, which homesteads are valuable chiefly for the timber standing and growing on them; and,

Whereas under existing law homesteaders are not allowed to cut or sell green or burned timber, except for the purpose of clearing and improving, and all burned timber not cut within a short period will become worthless and a loss to the settler and the Government: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all such persons actually occupying homesteads in said States of Wisconsin, Minnesota, and Michigan at the time of such fires, upon claims under the laws of the United States, on lands of the United States, whose property and buildings were destroyed by such fires, and the heirs of all such persons who perished by such fires, and all persons who by reason of such fires and loss of property were obliged to leave their homesteads, are hereby granted two years' additional time in which to make final proof. And temporary absence for any period within two years from the date of this Act shall be deemed constructive possession and residence, but shall not be deducted from the time required to make final proof.

SEC. 2. That all persons whose property was destroyed by such fires, and the heirs of all persons who were actual occupants of the homesteads at the time of the fire, and who lost their lives in and by that fire, may, by proving such actual occupancy at the date of such fires, make proof showing compliance with the law up to the date of the fire, and shall make payment at the minimum price under existing statutes, in the same manner as if such claimants were alive, and upon receipt of such proof of loss of property by such fires, or death of the claimant, heirs surviving, and upon payment as aforesaid, a patent shall be issued to such claimant, or his or her heirs.

SEC. 3. That the claimant upon any homestead, who by reason of not having lived thereon the necessary length of time to enable him to commute under section twenty-three hundred and one of the Revised Statutes as amended by the Act of March third, eighteen hundred and ninety-one, his heirs, executor, administrator, or guardian of his minor heirs, may, when the quantity of timber destroyed upon his or her homestead shall not exceed seventy-five thousand feet of merchantable green timber, file an estimate in the land office where such homestead was entered with such reasonable proofs as the Commissioner of Public Lands may prescribe, as to the quantity of timber destroyed upon any sectional subdivision, and thereupon the register and receiver may, under the direction of the Commissioner of Public Lands, issue a license or permit to cut the burned timber on any homestead or sectional fraction thereof, upon payment of the sum of one dollar and twenty-five cents per acre for such sectional subdivision, and the Government shall issue a patent for the same to the claimant or his or her heirs.

* Approved, January 19, 1895.

TIMBER LAND ENTRY—FINAL PROOF.

KATIE KENTNER.

The substitution of unadvertised witnesses, on the submission of final proof by a timber land applicant, does not call for the rejection of said proof, where the substitution was made in accordance with existing instructions from the General Land Office.

Secretary Smith to the Commissioner of the General Land Office, February 9, 1895. (J. L. McC.)

I am in receipt of your office letter of October 23, 1893, transmitting the papers in the appeal of Katie Kentner from the decision of your office of August 25, 1893, calling upon her to furnish non-mineral affidavit, and to make new publication, because the name of one of the witnesses who testified, was not given in the published notice of her final proof of her application to make timber land entry of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 25, T. 34 N., R. 2 E., Redding land district, California.

The non-mineral affidavit furnished by the appellant is substantially in accordance with the requirements of the timber land law, and in view of the fact that the entry has already been made, I see no reason for now requiring an additional non-mineral affidavit.

A very different question, however, is raised by the fact, shown by the record, that the name of only one of her corroborating witnesses was contained in the advertised notice of final proof. In the case of entries under other laws for the disposal of the public domain, the Department has uniformly demanded republication of notice when the testimony of the entryman was corroborated by only one witness, whose name was contained in the published notice—the other being a substituted witness. (See Amos E. Smith, 8 L. D., 204; Wenzel Paours, ib., 475; George F. Lutz, 9 L. D., 266; Herbert Higgins, ib., 646). It is true that the entries in the cases above named were pre-emption or homestead entries; but the Department has recently held that the same reason for using witnesses whose names have been advertised, exists in the case of timber land entries as of other entries. (Sarah L. Bigelow, 20 L. D., 6.)

The claimant, however, alleges that in substituting such unadvertised witness, she acted in accordance with permission contained in letters from your office. She states that on February 10, 1891, your office wrote to the register and receiver at San Francisco, "that neither the act of June 3, 1878, nor the instructions thereunder, require that the names of the witnesses shall be advertised; the substitution of a witness is not, therefore, material." Furthermore, that on April 17, 1891, your office, in reply to a request for instructions on this subject, from the register and receiver at Redding, California, wrote them: "In case it is found necessary on the date of proof to substitute a witness, you will not on that account object to the proofs."

If it be a fact that such instructions were transmitted to the local officers, and by them given to persons offering final proof before them, it relieves the entryman so instructed, of any charge of bad faith or intentional failure to comply with the law or the departmental rules and regulations made in pursuance thereof. If, therefore, you find, upon an examination of your records, that instructions were given as above alleged, you will direct the local officers to accept the proof, if sufficient in other respects than those hereinbefore referred to.

Your office decision of August 25, 1893, is modified as above indicated.

On January 10, 1895, departmental decision was rendered in the case of Sarah L. Bigelow, *supra*, by which republication was required, because the witnesses who testified at her final proof were not mentioned in the published notice. There can be no doubt, from what has since been disclosed in the examination of other cases brought before the Department on appeal from the Redding office, that the action of that office in accepting Bigelow's proof was in accordance with the directions of your office dated April 17, 1891 (*supra*), although the appellant in that case did not show that such was the fact. You will therefore examine the record in the Bigelow case, and other cases on appeal from the Redding land office that have since been decided by the Department based thereon; and if you find that they come within the ruling in the present case you will direct the local officers to accept the proofs, if in other respects sufficient—with the understanding, however, that the general rule requiring that the names of witnesses must be advertised shall apply in all cases not covered by explicit instructions heretofore issued by your office to the contrary.

SCHOOL LANDS—INDEMNITY—ISLAND—SURVEY—RESERVATION.

STATE OF CALIFORNIA.

The permanent reservation, for light house purposes, of an island lying off the coast of California, entitles the State to select indemnity for school lands lost to the State by reason of said reservation.

Under sections 2275, and 2276, R. S., as amended by the act of February 28, 1891, directing the Secretary of the Interior to "ascertain and determine by protraction or otherwise," and "without waiting for the extension of the public surveys," the townships for which school indemnity may be selected, in cases of public reservations, the protraction, by the United States surveyor general, of the township lines, over an island reservation, from a map of the State, published by the Department of the Interior, is a proper method of determining the amount of lands lost to the State.

A withdrawal of public lands for the purpose of creating a forest reserve precludes the subsequent selection of such lands as school indemnity.

Secretary Smith to the Commissioner of the General Land Office, February 16, 1895. (P. J. O.)

At the request of the Secretary of the Treasury this Department, on September 21, 1891, reserved permanently the entire surface of San

Clemente Island, off the coast of California, for the use of the light house establishment, and on September 26, 1891, your office forwarded the order to the United States surveyor-general of California.

From your office letter ("K") of January 12, 1893, to the Secretary of the Interior, on the subject now under consideration, I quote the following recital of facts—

On December 11, 1891, the register of the U. S. land office at Stockton, California, transmitted for consideration by this office certain applications made on behalf of said State for lands in T. 8 S., R. 23 E., M. D. M., which the State proposed to select as indemnity for the loss of school lands in the following townships alleged to be included within San Clemente Island, namely: T. 13 S., R. 16 W., T. 13 S., R. 15 W., T. 14 S., R. 16 W., T. 14 S., R. 15 W., T. 14 S., R. 14 W., T. 15 S., R. 15 W., and T. 15 S., R. 14 W., S. B. Meridian; also a map of San Clemente Island purporting to exhibit the townships containing the lands offered as the bases of said proposed selections, and having upon it the following certificate, dated Dec. 4, 1891, and signed by the U. S. surveyor-general of California: "I hereby certify that this map of San Clemente Island off the coast of California has been made in this office and that it, and the township lines shown thereon have been compiled by protraction from the map of the State of California compiled and published by the Department of the Interior in 1885, and is believed to be approximately correct."

Upon this showing, and in the absence of prior interfering claims on the tract books of this office, the applications of the State for lands in T. 8 S., R. 23 E., M. D. M. were admitted to record as valid, *prima facie*; and the local land officers at Stockton were advised accordingly, on April 27, 1892.

In the meantime, that is in February and March, 1892, a number of persons presented at the Stockton land office, applications to enter lands in T. 8 S., R. 23 E., M. D. M., which were rejected by the register and receiver, as being in conflict with the applications of the State above referred to.

From this action the said applicants appealed. Whereupon, this office ruled against them; but, upon reconsideration of the facts, such ruling was voluntarily rescinded Nov. 25, 1892, and on the same day the indemnity land applications made December 11, 1891, by the State of California, upon the basis of school sections and fractional townships in San Clemente Island were held for rejection and the local officers at Stockton were instructed to advise the applicants opposing the State, that decisive action upon their cases would be postponed until after the final disposition of the applications of the State.

By said decision of November 25, 1892, your office determined—

It appears that these selections were applied for prematurely in this, that the township plat of survey was not filed in the local office under the circular of October 21, 1885 (4 L. D., 202), until January 4, 1892, whereas the applications in question were made on December 11, 1891.

It further appears that the township embracing the lands described as the bases of the selections have never been surveyed, either in the exterior or the interior subdivisions, nor has the requisite action been taken by the Secretary of the Interior under section 2275, U. S. R. S., as amended by the act of February 28, 1891, to admit of selections being made of school lands for said townships covered by the reservation of San Clemente Island in the absence of a regular and formal survey thereof.

I am therefore of the opinion that the applications in question are irregular and inadmissible, and they are hereby held for rejection.

A motion for review of this decision was filed by local counsel for the State of California, and by your office letter of March 28, 1893, the

same was denied. The State now prosecutes its appeal, assigning error as follows—

1. In holding, positively and inferentially, that said indemnity selections were in any manner or degree illegal or defective because they were forwarded to the local office prior to the date when the township plat of survey was considered as filed and open to the public in the local land office, to wit: January 4, 1892.

2. In holding that it is a reason for said rejection that the lands described as the bases of selection had never been actually surveyed, and in holding that said San Clemente Island had not been surveyed.

3. In holding that the requisite action has not been taken by the Secretary of the Interior under section 2275 Revised Statutes, as amended by act of February 28, 1892, to admit of selections of indemnity being made for school lands in the townships covered by the reservation of San Clemente Island, in the absence of a regular and formal survey thereof by the Land Department.

4. In holding that the applications in question are irregular and inadmissible, and in holding them for rejection.

5. In rescinding the decision of the General Land Office dated April 27, 1892.

In the files I also find protests, filed April 14, 1894, against the allowance of selections Nos. 2729 to 2731, inclusive, by Messrs. Bradford, *et al.*, on the grounds that (1) the lands asked for are not subject to selection; (2) the losses designated as bases for the said selection did not and do not exist; (3) the said selections were premature as to the land; and (4) the said selections were premature as to the bases.

It seems that the appeals of the individuals, mentioned in the above quoted statement of facts, to enter lands in T. 8 S., R. 23 E., M. D. M., are retained in your office subject to the decision of the Department on the case at bar, with one exception, which, as I understand it, has been informally transmitted with the sole view of giving the Department all the facts in regard to this complication.

As I view it, there are two main propositions presented by the record for determination; the first being whether the State is entitled to make indemnity selections for school lands lost by the permanent reservation of San Clemente Island, situated some seventy miles off the coast of California, and the second, whether the protraction of the township lines as made was authorized by law, and formed a basis for selection.

It seems to have been conceded by your office that the State is entitled to indemnity for the losses in this island as the matter is not discussed in any of your office letters, neither is the matter referred to by counsel in their brief filed before the Department. So it seems to have been accepted as a matter of course that the State was entitled to the indemnity. I concur in this view, and were it not for the fact that the protestants and the other alleged adverse claimants raise the subject, it would be unnecessary to discuss it.

It is an historical fact that the State of California is composed of territory formerly belonging to Mexico, and by the acts of Congress of September 9, 1850 (9 Stat., 452), was admitted as a State into the Union. By the constitution of the State, adopted, ratified and pro-

claimed in 1849, its boundaries, so far as appertains to this decision, were defined as follows—

thence running west along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the 42d degree of North latitude; thence on the line of said 42d degree of North latitude to the place of beginning. Also all the islands, harbors and bays along and adjacent to the Pacific coast. (Hittell's Code and Statutes of California, Vol. 1, bottom page 64-5.)

By the constitution of 1879 (Deering's Political Code, bottom page 71), this part of the boundary is exactly the same.

The statute of the State (Id., Sec. 3945), defining the boundaries of Los Angeles county, concludes thus—"including the islands of Santa Catalina, *San Clemente*, and the islands off the coast included in Los Angeles county."

It will thus be seen by the constitutions and laws of California that San Clemente Island is recognized as being within its limits. In the same way other islands are mentioned as being in Santa Barbara county (Id., Sec. 3946), "including the islands of Santa Barbara, San Nicolas, San Miguel, Santa Rosa, and Santa Cruz." Informal inquiry in your office develops the fact that the State has made indemnity selections for school lands lost in place in all the named islands, except, of course, the one under consideration.

In addition to the claim by the State that these islands are a part of its territory, and the departmental recognition, Congress has also recognized this fact. In the civil and diplomatic appropriation bill for the year ending June 30, 1853 (10 Stat., 76), there will be found, on page 9, an appropriation for subdividing all the islands above mentioned, including San Clemente.

Again, by act of March 3, 1851 (9 Stat., 631), Congress passed an act "for the purpose of ascertaining and settling private land claims in the State of California," and for that purpose the appointment of a commission was provided for. Section 8 of that act provided "that each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government," shall present the same to the commission. Review by the district court and appeal to the supreme court of the United States were provided for. The supreme court in the case of the United States *v.* Andres Castillero (23 Howard, 465), reviewed a case thus appealed, involving the island of Santa Cruz, which is described as being "in the county of Santa Barbara, in the State of California." While the question of jurisdiction is not raised or suggested in that case, yet it is fair to assume that the court was not unmindful of the importance of such a question.

I am therefore of the opinion that the State is entitled to select indemnity for its losses by reason of the reservation of San Clemente Island.

By the act of Congress of February 28, 1891 (26 Stat., 796), sections

2275 and 2276 of the Revised Statutes providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes, it is provided that lands of equal acreage are granted where sections sixteen and thirty-six are included in any reservation or otherwise disposed of by the United States—

and it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such . . . reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each township, in lieu of sections sixteen and thirty-six therein, . . .

Section 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands . . . and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than a quarter of a township, one-quarter section of land: *Provided*, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named to compensate for deficiencies of school land in fractional townships.

It will thus be seen that the Secretary of the Interior is empowered "to ascertain and determine, by protraction or otherwise," and "without waiting the extension of the public surveys" the townships for which indemnity may be selected. It is apparent from a reading of section 2276, *supra*, that it was not contemplated by Congress that exact mathematical accuracy should be arrived at in ascertaining the area of the fractional townships lost to the State, because it is provided that the selections may be made by approximation, where the townships are fractional from natural causes or otherwise.

The United States surveyor-general of California protracted the township lines over the island of San Clemente "from the map of the State of California compiled and published by the Department of the Interior in 1885," as certified to by him December 4, 1891. By this map the following fractional towns are shown, varying from one-quarter of a section to about three-fourths of a township, to wit: T. 13 S., R. 16 W.; T. 13 S., R. 15 W.; T. 14 S., R. 16 W.; T. 14 S., R. 15 W.; T. 14 S., R. 14 W.; T. 15 S., R. 15 W.; and T. 15 S., R. 14 W.

Without approving this map, for the reasons stated, I think the method adopted by the surveyor-general for the ascertainment of the area of the lands lost to the State, is a sufficient compliance with the statute.

It is not shown when this map was filed in the office of the State surveyor-general of California, but there is a certificate of that office on

the copy before me dated December 12, 1891. So that it is fair to assume that it was filed between the two dates, December 4 and December 12. This map is the basis of the State selection which was filed in the local office December 11, 1891, and on that day transmitted to your office. As before stated, your office, by letter of April 27, 1892, allowed the selections; on November 25, 1892, it reversed the allowance, for the reasons hereinbefore stated, and on March 28, 1893, overruled a motion for review of the last decision.

All of the selections made by the State, with the exception of two, to wit: No. 2725, for lot 7, Sec. 23, T. 10 S., R. 21 E., M. D. M.; and No. 2740, for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 20, T. 10 S., R. 20 E., M. D. M., are in T. 8 S., R. 23 E., M. D. M.

Inquiry in your office develops the fact that all vacant land in the latter township was withdrawn from settlement, entry, or other appropriation November 5, 1891, pending examination with a view to establishing a forest reservation under section 24 of the act of March 3, 1891 (26 Stat., 1095), and the "Sierra Forest Reserve," including this township, was created by the President's proclamation of February 14, 1893. So that in any event the selection of the State of lands in T. 8 S., R. 23 E., M. D. M., must fail, for the reason that the withdrawal was made prior to the approval of said selections.

With the papers before me I find another map certified to by the United States surveyor-general of California, September 27, 1892, as follows—

I hereby certify that the township and section lines as projected in red upon this map and covering the island of San Clemente off the coast of California, have been carefully examined with regard to their relations with the lines of public survey as shown upon the general map of California, issued by the Interior Department in 1891. It is believed that the projection of said township and section lines having reference to said general map is approximately correct.

The area of the island is considerably less, as shown by this map, than the former one, and I am disposed to think is drawn with more accuracy than the first one, for the reason that the surface of the island is that shown by the United States Coast and Geodetic Survey, on a map prepared by that Department, of the "Pacific Coast from San Diego to Santa Monica," for the aid of navigation.

This protraction being in conformity with the later map of the State of California, prepared by the Department, it will be assumed that it is correct, and is approved.

So that, inasmuch as the selections made by the State must fail, for the reasons hereinbefore stated, with the exception of the two named; any further selections in lieu of land lost in the San Clemente Island should be based upon the area as shown by the map of September 27, 1892.

This determination renders it unnecessary to discuss the other proposition presented by the record.

It is therefore ordered that the State, on formally renewing its application for the selections in T. 10 S., R. 21 E., and T. 10 S., R. 20 E., M.

D. M., may be permitted to take the same if it is public land and subject to such selection; and the selection in T. 8 S., R. 23 E., M. D. M., is rejected.

Your office judgment is thus modified.

HOMESTEAD ENTRY—MINOR HEIRS—FINAL PROOF.

CURRAN v. WILLIAMS' HEIRS.

The provision in section 2292 R. S., that "in case of the death of both father and mother leaving an infant child or children" the "right and fee" of the land covered by the homestead entry "shall inure to the benefit of such infant child or children," contemplates the immediate investiture of said "right and fee" on the death of the last surviving parent; and that children so circumstanced are entitled to patent on due showing of compliance with law on the part of the entryman up to the time of his decease, the death of both parents, and the fact of minority.

*Secretary Smith to the Commissioner of the General Land Office, Feb-
(J. I. H.) ruary 16, 1895. (W. F. M.)*

On December 26, 1892, Hannibal Williams made homestead entry of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 18, township 19 S., Range 3 W., within the land district of Montgomery, Alabama. He died in March, of 1885. The entry was canceled on March 10, 1890, for failure to make final proof within the statutory period, and on May 20, 1882, Peter Curran made homestead entry of the same land.

On December 8, 1892, the local office transmitted to your office the petition of M. M. McCree, reciting, among other things, the death of Williams in 1885 and the death of his wife at a date prior thereto, the petitioner's appointment, on November 23, 1891, under the laws of Alabama, as guardian of the seven minor children of the entryman, Williams, that until the latter part of the month of September, 1892, all of the children of Williams were living upon the land, when they were ordered to leave by Curran, with which order they complied without the knowledge of petitioner, that the eldest of the minors is only eighteen years of age, and that they are all uneducated and unaccustomed to the transaction of business. The petition concludes with the prayer that the entry of Peter Curran be canceled and that of Hannibal Williams be re-instated, and that, as guardian of the said minor children, he be permitted to make final proof.

By office letter "C" of January 21, 1893, considering the foregoing petition, directions were given the local office as follows:

In view of the above facts you will inform Peter Curran that he will be allowed thirty days from notice to show why his entry should not be cancelled for conflict with the rights of an actual settler with valuable improvements. Should the Curran entry be finally cancelled, the entry of Hannibal Williams will be re-instated, in which case you will allow the petitioner, or the parties in interest, to submit final proof with a view to perfecting title.

The following final action was taken by your office by letter "C" of April 25, 1893:

You having reported no response from Mr. Curran after due notice, his entry is hereby held for cancellation, and you will advise him of this decision and of his right of appeal under the rules.

Curran has brought the case on appeal here, alleging as error,

1. That he had no notice as directed by office letter "C" of January 21, 1893.

2. In considering McCree's petition at all, insomuch as the entry of Williams was legally cancelled and appellant's entry was in all respects legally made.

This case appears to me to be controlled by the provisions of section 2292, of the Revised Statutes, which is here quoted in full, as follows:

In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the state in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified.

No case has yet arisen in the administration, by this Department, of the land laws of the United States, in which it has been necessary to give construction to the first paragraph of the section quoted, but the language is plain and unambiguous, so that there can scarcely be difference of opinion as to its meaning. "The right and fee," says the law, "shall inure to the benefit of such infant child or children," and it would seem to have been the intention of the Congress that the investiture of this "right and fee" should take place immediately upon the death of the last surviving parent. If this provision is to be given the full effect, therefore, that its terms fairly import, the infant children of an entryman when so circumstanced as to come within its purview, become entitled to patent upon showing duly made of the essential facts upon which their right depends. Those facts are compliance with the law on the part of the entryman up to the time of his decease, the death of both parents, and the minority of the children. This construction gives rational and beneficent effect to the law, any other construction would destroy at once its plain letter, and its beneficence.

The decision of your office is, therefore, set aside, and it is now ordered that an inquiry be directed before the local office for the purpose of ascertaining the facts upon which to base action in accordance with the views herein expressed. It is further ordered that Peter Curran have due and legal notice of the hearing hereinbefore provided for.

DESERT LAND ENTRY—ANNUAL PROOF.

ANDREW CLAYBURG.

The desert land law does not authorize taking annual proof before a notary public. The local officers are not authorized to reject annual desert land proof. If said proof is found insufficient they should inform the entryman that adverse action thereon will be recommended by them, and that he will be allowed thirty days in which to file exceptions to said recommendation. The proof, recommendation and exceptions should be transmitted to the General Land Office for consideration at the proper time.

The filing of the annual proof required by the act of 1891 showing the expenditure of the requisite amount is all that is required with respect to said proof to preserve intact the entry during the three years, or prior to offering final proof. In *ex parte* cases the entryman's right to the land will not be passed upon until the submission of final proof.

Orders of the General Land Office with respect to annual desert proof will be treated as interlocutory, from which no appeal will be allowed.

The provision in section 7 of said act authorizing calls for additional proofs has reference to entries made prior to the passage of said act in which the entryman has elected to perfect his entry under said act.

Secretary Smith to the Commissioner of the General Land Office, February 16, 1895.
(J. I. H.)

The land involved in this case is the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 26 N., R. 17 E., Susanville, California, land district.

The record shows that on the 11th day of February, 1892, Clayburg made desert land entry for said tract.

On January 16, 1893, Clayburg submitted his first yearly proof under said entry, which was rejected by the local officers, for the reason that "the affidavit was made before a notary public, an officer having no authority to issue (administer) oaths in such cases, as held by the Hon. Commissioner."

From this decision Clayburg appealed.

On May 24, 1893, your office rejected Clayburg's proof, and allowed him sixty days within which to furnish new proof,

executed before a qualified officer, or to appeal from this decision, and that failing to do either of which, his entry will be cancelled. . . . As to your right of rejecting yearly proof, your attention is called to instructions set forth in the case of James Bean (letter G, May 2, 1893).

In your office decision, in the Bean case referred to, it was said—

In this connection, you are informed that you are not authorized to reject yearly proof. Should minor defects be found in such proof, when submitted, you will allow a reasonable time for their correction.

If the proof be essentially insufficient, advise the party in interest that you will submit to this office, within thirty days from notice, your recommendation that such proof be rejected, and also advise him of his right of appeal within that time.

The specification of errors in the case is based on two grounds of alleged error:

1. In holding that the affidavits constituting said yearly proof were not made before an officer authorized by law to administer oaths in such cases.

2. In rejecting said yearly proof. And the appellant further objects to said decision, and to the whole thereof, on the ground that the rule sought to be enforced is not a rule of law, but one promulgated by the Land Department; and that said rule is not supported by any good and sufficient reason, and ought therefore to be given no force or effect.

There is no argument in support of the appeal in this case with the record, but the Department is referred to the brief filed in the case of Will H. Earl, on appeal from your office decision of January 7, 1893, wherein the appeal is taken "on grounds identical with this, and the determination of the same considerations are necessarily involved." By reference to the Earl case I find that the local officers transmitted the appeal in it, with nineteen other cases, involving the same questions as the case at bar.

The act of May 26, 1890 (26 Stat., 121), provides—

That "the proof of settlement, residence, occupation, cultivation, irrigation, or reclamation, the affidavit of non-alienation, the oath of allegiance, and all affidavits required to be made under the homestead, pre-emption, timber-culture and desert-land laws, may be made before any commissioner of the United States circuit court, or before the judge or clerk, of any court of record of the county or parish in which the land is situated.

This act is entitled, "An act to amend section 2294 of the Revised Statutes, and for other purposes." Said section provided that in cases where the applicant "for the benefit of the homestead," under certain circumstances,

is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, it may be lawful for him to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident," etc.

The act of 1890 was construed in the case of Edward Bowker (11 L. D., 361), as not in any manner changing existing provisions defining the place for taking the proofs required but simply as designating an additional or new officer before whom such proof might be taken.

In Nancy J. Crews (12 L. D., 560), it was held that pre-emption final proof can not be accepted where the final affidavit is made before a notary public.

In James J. Feely (16 L. D., 271), it was held that the provisions of the act of May 26, 1890, did not authorize the execution of a desert land declaration before a commissioner of a circuit court outside of the county in which the land is situated.

In the light of these authorities, and the language of the act of May 26, 1890, *supra*, it is clear that a notary public is not such an officer as the desert law authorizes the taking of the yearly proof before. There was no error in your office ruling rejecting Clayburg's proof.

This disposes of all the questions directly presented by the appellant in his appeal; but in view of the great number of cases like the one at bar, all of which are *ex parte*, and the numerous questions respecting the proof required and practice pertaining thereto, that may arise in

connection with the administration of the desert law as amended by the act of March 3, 1891, it seems to be proper for the Department, at this time, in order to expedite the disposal of entries under said act, to express its views on some of the questions arising, and likely hereafter to arise, in connection therewith.

On March 13, 1894, your office transmitted to the Department the "first and second yearly proofs on said (Clayburg's) entry, which has been found satisfactory by this office." I assume that in other similar cases pending here on appeal from your office like action has been taken by it.

This presents the questions as to the character of the annual proof required of the entryman, the action of the register and receiver and your office thereon, and the further question as to whether the entryman has the right of appeal from the action of the local officers to your office, and from its action on such proof to the Department.

The instructions, contained in your office letter of May 2, 1893, to the local officers at Susanville, California, respecting the authority of the local officers to act on yearly proofs, were, in my opinion, correct, with the exception of the clause which authorizes an appeal to your office from the recommendations of the register and receiver; instead of allowing an appeal from their recommendation, I think the entryman should be allowed thirty days in which to file with the local officers his exceptions to their recommendations, which exceptions should be transmitted, with the proof and recommendation, to your office for consideration at the proper time.

This leads to the consideration of the question as to whether the action of your office on the yearly proof required by the act of 1891, in desert-land entries, is, or ought to be, of such a character as entitles the entryman to appeal therefrom. This inquiry can be best answered by an examination of the act of March 3, 1877 (19 Stat., 377), and the act of 1891 (26 Stat., 1095), respecting the proof required in order to consummate a final entry. The act of 1877 provided that at any time within three years after filing the declaration, upon making satisfactory proof to the register and the receiver of the reclamation of the land embraced in the declaration, and upon the payment to the receiver of the additional sum of one dollar per acre, a patent for the same should be issued to him. The regulations issued thereunder provided that upon the making of such proof and payment, the receiver was required to issue duplicate receipt, and the register to issue "final certificate of purchase." (See General Circular of March 1, 1884, pp. 35 to 37, inclusive.)

The act of 1891 amends the act of 1877 by making it provide—

Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons

entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

The prime and ultimate purpose of Congress in enacting these sections was to secure, through a system of irrigation, the complete reclamation of desert lands, so that they will produce ordinary agricultural crops; to this end a certain mode or manner of reclamation is required, and a time fixed within which the reclamation shall be completed. The mode or manner prescribed is through a systematic irrigation, by means of main canals, branch ditches, the purchase of water rights, the aggregate cost of which must be at least three dollars per acre of the whole tract entered. If the land is reclaimed in the manner prescribed, and within the time allowed, the requisite proofs, expenditures and payments made substantially as the law requires, then the entryman will be entitled to patent for the land covered by his entry.

The filing of the map at the inception of the entry, the expenditure of the three dollars per acre of the whole tract reclaimed, the cultivation and the filing with the register of yearly proofs are all required for the purpose of showing the good faith of the entryman. The filing of proof by affidavit each year "that the full sum of one dollar per acre has been expended in such necessary improvements during such year" seems to be mandatory, but only so as to the matter of filing the proof each year. This is clear from the language used:

If any party who has made such application *shall fail during any year to file the testimony aforesaid*, the land shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled.

This makes the failure *to file* this testimony during any year as the ground upon which his entry may be canceled, and in every case where there is a total failure to file such testimony during any year after a desert declaration has been filed, upon information of such failure, your office clearly has full and complete jurisdiction to proceed, under the rules of practice, against such entry and to finally cancel the same for such failure. It follows, as a matter of course, that the party aggrieved in such case shall have the right of appeal to the Department from the action of your office, in every respect the same as the right of appeal is accorded to entrymen under the homestead and other laws, under the rules of practice.

In cases where the entryman files the yearly testimony within the time as provided in section five of said act, it is clear that such *filing*, when duly made, of itself, serves to exempt his entry from forfeiture, provided it shows the expenditure of at least one dollar per acre for the whole tract entered, during the particular year for which it may be filed. It follows that in such a case your office has no jurisdiction to hold for cancellation, or to cancel, and render any final judgment affecting the entry on the ground that the entryman had forfeited his right to consummate his entry. In other words, the filing of the yearly testimony showing the expenditure of the requisite amount on the land is all that is required with respect to the annual proof to preserve intact the entry during the three years, or prior to offering final proof, when he is required to show full compliance with the law in all respects in order to procure a patent for the land covered by his entry.

In *ex parte* cases his right to the land will not finally be passed upon until he offers his *final* proof, where he does so within the time allowed. From the adverse action of your office on such final proof the entryman has the right of appeal, the same in all respects as allowed in cases of final proof under other laws.

When the annual testimony or proof required has as a matter of fact been furnished by an entryman, under the act of 1891, it follows that any order, relating to such testimony, made by your office, must be held to be interlocutory in character, and consequently no appeal therefrom to the Department will lie.

The provision in section seven of the act: "That additional proofs may be required at any time within the period prescribed by law," evidently has reference to entries made prior to the passage of the act of 1891, in cases where the entryman may elect to perfect his entry under said act instead of under the act of 1877. It would seem but fair and reasonable that, where an entryman, under the act of 1877, elects to perfect his entry under the act of 1891, and thereby avails himself of the one year's extension of time granted by the latter, in which to make final proof, that such entryman should furnish the additional proofs required under the act of 1891, so as to conform as near as practicable to the proofs required of those who make entry under said act, and where such proofs are called for by your office and not furnished,

then your office will have jurisdiction to hold for cancellation such entry. In such cases the entryman would have the right of appeal to the Department from the action of your office.

For the foregoing reasons your office decision of May 24, 1893, rejecting Clayburg's annual proof is hereby set aside, and the papers in the case, transmitted by letter "G" of January 15, 1894, are herewith returned, with directions to proceed in said matter in accordance with the views herein expressed.

MINING CLAIM—CITIZENSHIP—CORPORATION.

SILVER KING MINING CO.

Under the terms of section 2321 R. S., the citizenship of a corporation that applies for a mineral patent may be shown by a certificate of incorporation.

Secretary Smith to the Commissioner of the General Land Office, February 16, 1895.
(J. I. H.)

The above entitled case is before me on appeal from your office decision of August 14, 1893, in which was decided a motion of said Silver King Mining Company for reconsideration of your holding in your office letter of June 20, 1893, that in the application of said company for a patent of the "Blue Bell Lode" a "certified copy of articles of incorporation, certified by the proper office, must be furnished,—the mere certificate of incorporation being insufficient."

Section 2321 (Revised Statutes, 427), provides that—

Proof of citizenship under this chapter may consist in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter, or certificate of incorporation.

The language of the statute is in the alternative, and the statutory requirement is satisfied, by doing either one or the other. The said company has filed in your office a properly certified certificate of incorporation, and has therefore complied with the law, as strictly as if it had filed the required certified copy of articles of incorporation.

Your office decision is reversed.

PRACTICE—INTERVENER—APPEAL—CERTIORARI.

C. N. FELTON.

A stranger to the record will not be allowed to intervene for the purpose of reopening a case finally adjudicated without notice of his interest; nor is the applicant in such case entitled to be heard on appeal from the denial of his application. The writ of certiorari will not be granted where the right of appeal is properly denied, and no ground is shown for departmental interference.

Secretary Smith to the Commissioner of the General Land Office, February 16, 1895.
(J. I. H.) (E. M. R.)

This is an application for writ of certiorari by C. N. Felton, from your office decisions of May 12 and June 29, 1894, denying his petition

for a hearing to determine the status of Oregon swamp lists Nos. 77 and 78, and dismissing his appeal.

The record shows that on January 5, 1894, the claim of the State of Oregon, under the swamp grant act, to the lands embraced in these lists, was rejected for the reason that the waters in Goose Lake on March 12, 1860, covered the land specified in such lists. The decision referred to was based upon the authority of *John L. Morrow et al. v. State of Oregon* (17 L. D., 571), and *State of California* (14 L. D., 253).

The governor of the State of Oregon was notified of this decision, and on March 23, 1894, the local officers at Lake View, Oregon, reported that due notice of said decision of January 5, 1894, had been served upon the governor and that more than sixty days had expired since he acknowledged such service of notice, but no appeal had been filed. Thereupon the decision was made final.

On May 9, 1894, C. N. Felton filed in your office this petition, accompanied by affidavits asking for a hearing, which petition was rejected May 12, 1894, for the reason, as appears therein, that the application had not been filed in time.

June 15, 1894, Felton filed an appeal which was dismissed by your office decision of June 29, 1894, for the reason that

The claim of the State to the tracts embraced in said list was rejected after due notice from the State, as clearly set forth in the office decisions of May 12, and June 4, 1894, and you were fully advised that, as Mr. Felton was not a party to the case he could not be recognized as a party in interest. He filed with his appeal six specifications of error which it is not deemed necessary to consider for the reason that, as has already been decided in the decisions complained of, Mr. Felton was not a party to the case, and as he can not properly apply for a hearing, he could not have the right of appeal, and his appeal is therefore dismissed.

The record does not contain copies of the decisions of June 4, 1894, and January 5, 1894.

The appeal to this Department is vague and indefinite, alleging error as follows:

Because of the holding by implication that appellant, Charles N. Felton, had any notice of the rulings of the General Land Office concerning this case, in which his interest is conclusively proved.

Because of the holding that the right to intervene is restricted by rules governing as to time the filing of appeals or petitions for hearing.

Because of the failure to consider the affidavit of E. P. McNornack, filed with the application for hearing on May 9, 1894, which set up that appellant having learned of the requirement of the General Land Office, dated January 5, 1894, had made effort to comply therewith, but that by reason of the miscarriage of documentary evidence mailed by him to the General Land Office, the same failed to be considered.

Because of the holding, by implication, that the statement contained in said affidavit that the lands involved herein were sold by the State of Oregon to one H. C. Owin (from whom appellant derived title) in 1885, was untrue, when it is a notorious fact that the State of Oregon sold lands, presumably swamp, prior to survey thereof.

Because of error in not holding that the petition for hearing of May 9, 1894, was one based upon newly discovered evidence to which rule 77 of practice should have been applied, which rule provides that motions for review or rehearing *except* when based upon newly discovered evidence, must be filed within thirty days from notice of such decision.

This case had been decided and finally closed when the applicant sought to intervene. A stranger to the record will not be heard to ask to be made an intervener in a case that is already adjudicated, and therefore the evidence introduced by the party to show interest in the subject-matter can not be newly discovered evidence. The applicant was not a party to the proceedings heretofore had, and was not entitled to notice of the decision, as he had not disclosed his interest. However, the only question before the Department is that of the right to the writ of certiorari, and upon that question your office decision was not in error in refusing to forward the appeal. The application for the issuance of the writ of certiorari is denied.

ABANDONED MILITARY RESERVATION—FORT BRIDGER.

INSTRUCTIONS.

Secretary Smith to the Commissioner of the General Land Office, February 18, 1895. (J. I. H.) (F. W. C.)

I am in receipt of your office letter of January 22, 1895, in the matter of the disposal of lands in the abandoned Fort Bridger military reservation in Wyoming, in which you request that a price be fixed upon the land and that the rate of interest and date of payment be also determined upon as required by the act of Congress approved August 23, 1894.

With your office letter of April 23, 1892, was submitted the report of the appraisers appointed to appraise the lands within said reservation, action upon which was suspended at the time on account of pending legislation.

By the act of Congress approved August 23, 1894, provision is made for the opening to settlement, under the public land laws, of lands not disposed of in any abandoned military reservation, where the area exceeds five thousand acres.

Your office letter reports the area of the Fort Bridger reservation to be 10,941.06 acres, so that the same comes within the provisions of the act just referred to.

After an examination of the report of the appraisers I have approved said report which is herewith returned for the guidance of your office in the disposal of said lands under said act.

By the first section of the act referred to it is provided:

That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payments may, at the option of the purchaser, be made in five equal installments, at the time and at rates of interest to be fixed by the Secretary of the Interior.

It becomes necessary, therefore, that this Department shall determine upon the time for payments to be made under the entry of any of these lands under said act, and the rate of interest to be paid upon deferred payments.

I have therefore to direct that the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal annual payments to date from the time of the acceptance of his proof tendered on his entry, and that the rate of interest upon deferred payments be charged at the rate of 4 per cent. per annum.

You will instruct the local officers accordingly in the matter of the disposal of these lands.

ISOLATED TRACT—PUBLIC SALE—PRIVATE ENTRY.

JACOB SCHMIDT.

If a forty acre tract of government land remains without a claimant under existing laws, and the contiguous tracts are all patented, such a tract may be regarded as "isolated or disconnected," and may, in the discretion of the Commissioner of the General Land Office, be sold at public sale.

If at the public offering of such land there are no bids therefor, and it is not then sold, there is no existing law authorizing subsequent private entry thereof.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (G. O. R.)

I have considered the application of Jacob Schmidt for a writ of certiorari directing your office to transmit to the Department the record in the matter of his cash entry No. 7703, made March 2, 1894, for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15 and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 22, T. 20 S., R. 69 W., Pueblo, Colorado.

It appears that on November 15, 1893, upon the application of Schmidt, your office authorized an offering at public sale, under section 2455 of the Revised Statutes, and according to circular of January 18, 1851 (Lester, p. 350), the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 22, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 26, T. 20 N., R. 69 W., Pueblo, Colorado.

It appears that due publication and posting of notice were made, fixing February 20, 1894, at ten A. M., for the offering, at which time there were no bidders; the sale was immediately closed, and the tracts held subject to private entry, according to the instructions contained in the third paragraph of the circular of 1851 (*supra*).

On March 2, 1894, Schmidt made private cash entry No. 7703 for the two forty acre tracts, first above described.

On May 9, 1894, your office decided the entry to be illegal, and therefore held the same for cancellation, by reason of the provisions contained in the first section of the act of March 2, 1889 (25 Stat., 854),

namely: "No public lands of the United States, except those in the State of Missouri, shall be subject to private entry."

From that action Schmidt appealed. His appeal was filed two days too late, and for that reason your office decided he had no right of appeal, and declined to entertain it; whereupon he makes application, under Rule 83, for an order directing your office to certify the record, &c.

It is stated in the application that on day of sale (February 20, 1894,) no one was present, except Schmidt, and no bids were offered for the land—Mr. Schmidt being then unable to purchase for lack of means. Eight days thereafter he raised a part of the required amount, and entered two of the tracts previously offered on February 20th.

On March 3, 1894, your office advised him that the tracts offered, and not sold, did not thereafter become subject to private entry.

On April 12, 1894, Schmidt filed his petition, asking that his entry be confirmed, or that the same be referred to the Board of Equitable Adjudication. Your office, as above seen, denied this petition.

Under the 9th section of the act of March 3, 1891 (26 Stat., 1095), it is provided that no public lands of the United States shall be sold at public sale, except

abandoned military or other reservations, isolated and disconnected fractional tracts, authorized to be sold by section 2455 of the Revised Statutes, and mineral and other lands, the sale of which at public auction has been authorized by acts of Congress of a special nature having local application.

Section 2455 provides that it may be lawful for the Commissioner of the General Land Office to order into market

after due notice, and without the formality and expense of a proclamation . . . such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner.

These two statutes authorize the Commissioner of the General Land Office, in his discretion, to offer for sale "isolated or disconnected tracts" of unoffered lands.

If a single forty acre tract of government land remains without a claimant under existing laws, and the contiguous tracts are all patented, such a tract may be regarded as "isolated or disconnected," and may, in the judgment or discretion of the Commissioner of the General Land Office, be sold at public sale. This discretion may well be exercised in the disposal of such tracts as may be found in arid regions or in those States to which the desert land laws apply.

Section 2455 of the Revised Statutes provides that thirty days notice shall be given of such contemplated sale, the evident purpose being to dispose of such lands to the highest bidder; if, at the offering, no one bids for the tracts, and they are not then sold, there is no existing authority for their subsequent disposal at private entry.

Mr. Schmidt's inability to buy at the sale for lack of means can not validate his purchase, made eight days later, when there was no chance

for competing bids; his purchase and the issuance to him of a certificate in evidence thereof, was to all intents and purposes a private entry, which the statutes forbid.

The petition is denied.

RIGHT OF WAY AND STATION GROUNDS—FORFEITURE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 23, 1895.

REGISTER AND RECEIVER,

Chamberlain, S. D.

SIRS: By section 16, act of March 2, 1889, (25 Stat., 888), a grant of lands for right of way and station purposes was made to the Chicago, Milwaukee and St. Paul Railway Company on certain conditions. The lands selected by the company for station purposes are shown by two plats filed by the company, approved by the Secretary of the Interior January 24, 1890, copies of which were sent you September 1, 1891, and include, on one map, 188 acres as follows: lots 2, 3, and 4, and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 10 and lots 1 and 9 of Sec. 15, T. 104 N., R. 71 W.; and on the other map 640 acres as follows: lots 6, 7, 8, and 9, Sec. 19; lot 6, Sec. 30, T. 104 N., R. 71 W.; lots 4, 5, and 6, Sec. 23; lots 5, 6, 7, and 8, and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 24; lots 4, 5, 6, and 7, Sec. 25, and lots 6 and 7, Sec. 26, T. 104 N., R. 72 W.

One of the conditions of the said grant, that the railway should complete and operate its road within three years after the act takes effect, not having been complied with, the President of the United States did, on December 5, 1894, in compliance with the provisions of the act, declare that the said lands are forfeited to the United States, and subject to entry under the homestead law, as provided by the said act of March 2, 1889, whenever the Secretary of the Interior shall give due notice to the local officers of this declaration of forfeiture.

In pursuance of instructions of the Secretary of the Interior [see 19 L. D., 429], you are directed, immediately upon receipt of the triplicate plat of the tracts west of the Missouri River, which have now been properly lotted, from the surveyor general, who has been this day instructed to forward it to you, to cause the said proclamation (copies enclosed) to be published together with notice that, on and after a given date, not less than thirty days from date of first publication, you will receive entries for the tracts, describing them by legal subdivisions, so restored to the public domain, according to the provisions of the said act of March 2, 1889, (25 Stat., 888). (See pp. 43, 44 and 45 of the General Circular). This notice to be published once a week for thirty days (six publications) in some newspaper of general circulation in your district, and in the vicinity of the lands.

The receiver will pay the cost of the publication, and transmit a copy of the notice, with evidence of the publication, as his voucher for the disbursement. You will also immediately on publication transmit a copy of the issue of the paper containing the first publication of the notice to this office for its information.

Upon the copies of the two approved plats, on file in your office, showing the railroad right of way, you will note that the grants there shown have been declared forfeited by the President's proclamation of December 5, 1894.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH,
Secretary.

DOWMAN *v.* MOSS.

Motion for review of departmental decision of December 19, 1894, 19 L. D., 526, denied by Secretary Smith, February 23, 1895.

PRACTICE—ORAL ARGUMENT—RULE 110.

EUGENE *v.* CENTRAL PACIFIC R. R. CO.

The granting of an oral argument at any time is entirely in the discretion of the Secretary of the Interior, and after final judgment has been rendered in a case, it will not be granted except upon grounds which warrant a motion for review.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (P. J. C.)

I have before me a "petition for re-hearing," filed by counsel for Manuel Eugene. This is a controversy between said Eugene and the Central Pacific Railroad Company, involving the right to lots 3 and 4 and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 13, T. 2 S., R. 2 W., M. D. M., San Francisco, California, land district.

By departmental decision of December 11, 1894 (L. & R. No. 299, p. 19), the action of your office in awarding the land to the railroad company was formally affirmed.

The "petition for a re-hearing" is simply an application to have the case re-opened for oral argument. This cannot be permitted. Parties desiring to be heard orally before the Department must bring themselves within the Rules of Practice (Rule 110). In any event the granting of an oral argument at any time is entirely in the discretion of the Secretary of the Interior, and after final judgment has been rendered, it will not be granted except upon grounds which warrant a motion for review.

The petition is therefore dismissed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—APPLICATION.

CENTRAL PACIFIC R. R. CO. *v.* HAWKINS.

The provisions of the grant to the California and Oregon R. R. Company forbid the withdrawal of land for indemnity purposes, and a withdrawal for such purpose confers no right upon the company.

A pending application to make a second homestead entry defeats a subsequent indemnity selection of the tract covered by such application.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (F. W. C.)

I have considered the appeal by the Central Pacific Railroad company, successor of the California and Oregon Railroad company, from your office decision of February 25, 1889, rejecting said company's attempted selection of the SE. $\frac{1}{4}$, Sec. 23, T. 35 N., R. 1 W., M. D. M., Shasta land district, California, on account of the pending application by John F. M. Hawkins to make homestead entry of said tract which application was forwarded with register's letter of November 28, 1885.

Said application by Hawkins was accompanied by his affidavit duly corroborated setting forth the facts relative to a previous homestead entry made by him on July 30, 1883, from which it appears that at the time of making the former entry he was under a misapprehension as to where the land covered thereby was situated and that upon investigation it was found that the land actually selected by him was embraced in the homestead entry of one Thos. Harney, and that the land actually entered by him was of no value and that he could not make a living thereon. Further, that he has made valuable improvements upon the land in question for which he desires to make homestead entry having cultivated the same and raised several crops thereon.

His application under consideration to enter the land in question is accompanied also by a relinquishment of the land formerly entered.

This land under consideration is within the indemnity limits of the grant for the California and Oregon Railroad company and on January 7, 1886, nearly two months after Hawkins had applied to make the entry in question the company applied to select said land on account of its grant which application to select was rejected for conflict with the application by Hawkins, and the company duly appealed to your office.

Your office decision of February 25, 1889, found that the showing made by Hawkins is sufficient upon which to authorize the allowance of a second entry and that his application therefor pending at the time of the company's selection is a bar to the same, and the rejection of the company's selection is therefore sustained.

Appeal brings the case before this Department.

The grant under which this company claims contains a provision similar to that contained in the grant for the Northern Pacific Railroad.

company which in the cases of *Northern Pacific Railroad Co. v. Miller* (7 L. D., 100); same *v. Jennie L. Davis* (19 L. D., 87), was held to be an inhibition against the withdrawal of indemnity lands.

The company can therefore have no claim to the land in question prior to the presentation of its application to select presented, as before stated, on January 7, 1886. At that time the application by Hawkins under consideration was pending, and agreeing with your office decision in finding that the showing made in support of the same sufficient to authorize the allowance of a second homestead entry I must affirm your office decision, direct the cancellation of the previous entry made by Hawkins and the allowance of the present application under consideration.

The company's attempted selection of this land will stand rejected.

PACK *v.* MOSES.

Motion for review of departmental decision of November 30, 1894, 19 L. D., 360, denied by Secretary Smith, February 23, 1895.

CHANGE OF ENTRY—ERRONEOUS SURVEY.

NOYES *v.* BEEBE (ON REVIEW.)

The right of a party to have the lines of his entry changed so as to embrace other lands, on the ground that his entry, through an erroneous survey, does not cover the land intended to be taken, can not be recognized, where the entry in question was made with full knowledge of the facts, carried to patent as made, and adverse rights have intervened that, by the record, are not in conflict with said entry.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (J. I. H.) (F. L. C.)

Almond R. Noyes has filed a motion for review of the decision of this Department, rendered on March 23, 1893, and reported in 16 L. D., p. 313, in the consolidated cases of *Ex parte* Almond R. Noyes and Almond R. Noyes *v.* Avery A. Beebe.

It appears that Noyes made pre-emption cash entry on January 15, 1891, of lots 1, 2, and 3 of section 3, township 35 N., range 37 E., and lots 2 and 3 of section 34, township 36 N., range 37 E., within the land district of Spokane Falls, Washington. He filed declaratory statement on June 23, 1890, and alleged settlement April 20, 1880. The entry was passed to patent January 18, 1892.

On February 18, 1891, Beebe made homestead entry of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 3, township 35 N., range 37 E., of the same land district. He commuted his entry to cash, and when, on December 29, 1891, he submitted his final proof,

Noyes appeared with a protest against its allowance. No written protest is found among the papers of the case, and it is to be presumed, therefore, that Noyes merely appeared at the local office and made verbal objection to the acceptance of Beebe's proof. It seems, however, that the officers below neglected to specifically note the grounds of the protest. From the whole record it is gathered that Noyes claimed a portion of the land embraced in Beebe's entry to have been occupied, cultivated and improved by him for several years, to Beebe's knowledge, and that he was resting in the meanwhile, under the belief, also to Beebe's knowledge, that it was included in his own entry.

The register and receiver found that there was no conflict between the entries of the parties, that Beebe had complied with the homestead law, and dismissed the protest.

On November 11, 1891, Noyes presented a petition to the General Land Office praying that the approval of the plats of the townships containing the lands entered by him

be set aside, and that new plats may be substituted therefor, to the end that divers errors in the present plats may be corrected, and that the petitioner may be relieved against great hardship, the consequence of an error in his entry into which he was led by the said errors of the plats.

In further elaboration of the grounds of the relief sought the petitioner also filed

a plat showing a survey made by Charles H. Morgan, a civil engineer, bearing an affidavit of the said Charles H. Morgan that said plat shows correctly the course of the bank of the Columbia river and its relation to the lines of the public survey and also the course of the meander line said to be run by the government surveyor as indicated by his field notes; and also affidavits from two chainmen who claim to have participated in the government survey. (The petition concludes:) And, because said papers filed herewith and referred to herein show that the government plats include land which is commonly covered with water and is part of the bed of the Columbia river, and represent the course of said river to be at a great distance west of its true course, whereby the petitioner was led to pay for land of no value and failed to enter the land which he intended to enter, the petitioner prays that the said plats may be corrected so as to show the true course of the river and the proper description of the lands which he has entered.

He did this without notice to Beebe, who had at the time of said petition a homestead entry of record for the eighty acres lying east of the Noyes claim, which fact the latter was bound to know.

Your office, by its letter of February 24, 1892, acted upon the matter ex-parte, and denied the petition.

In said letter it appears that the alleged errors in survey had therefore been brought to the attention of your office by a letter from the surveyor-general of Washington, dated December 17, 1890, inclosing one from the register at Spokane Falls, dated August 14, 1890, together with a plat and corresponding field notes of a survey of section 3, of township 35 north, in range 37 east, executed by the surveyor of Stephens county, Washington, at the request of A. R. Noyes; also an affidavit of said Noyes setting forth that he had filed a declaratory

statement, June 23, 1890, for the tracts afterwards found to be those described in his cash entry, and that he did so with the impression that his said filing embraced all the land west of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 2, in other words, all the land between said tract in section 2 and the Columbia river. In said statement he admits that he was familiar with the surveys.

The surveyor-general, in reporting upon the matter, stated that the government survey had been carefully examined by a draughtsman in his office, and found to be substantially correct. He further stated:

I have also ascertained since the receipt of the report of the survey made by the county surveyor, that Deputy Berry ran the meander lines at extreme low water mark, as represented in his field notes and as shown on the enclosed "Diagram A;" also that there is a slough outside of the line as shown on the diagram of the county surveyor, and inside of the meander line as shown by Deputy Berry, which at certain seasons of the year are nearly or quite dry, and that along this slough Mr. Noyes has cut considerable quantities of hay.

It is very evident that the county surveyor made his survey as directed by Mr. Noyes and that the lines he has run terminate not only above low water mark, but above high water mark on the top of the bank.

The matter is therefore submitted to you for such further action as may be deemed necessary as to any correction of the survey and plat, respectfully recommending that no change or correction be made in the survey as executed by U. S. Deputy Surveyor Berry.

Your office, acting upon the matter, said, on January 29, 1891, that after due consideration the views and recommendation above referred to were fully concurred in. In the meantime, Noyes had, with full knowledge of the condition and character of the survey, as indicated by the foregoing, gone on with his claim as of record, making final proof, paying for the land as described in his declaratory statement, and on January 15, 1891, receiving final certificate, and subsequently, in January, 1892, receiving patent.

With these record facts before him, Beebe made homestead entry of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 3, T. 35 N., R. 37 E., which the records showed to be clear, but which Noyes now seeks to have included in his claim.

To now allow Noyes's application would necessitate the cancellation of the Beebe entry. In my judgment, no such reason is presented as would justify this. Noyes claims to have had a mistaken notion of the boundaries of his land. This is possible, but it is scarcely compatible with his statement that he was "familiar with the surveys." He was on the land covered by his patent when it was surveyed. That he was cognizant of what was being done appears from the fact that the field notes of the United States survey note him as claiming the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 3, with tracts west thereof to the river. He must have notified the deputy surveyor of such claim or it would not have been so noted. Notwithstanding this, he subsequently made a record claim, excluding the two forties now covered by

the Beebe entry. This may justly be construed as a change of purpose on his part, and as a deliberate intention to abandon the tracts in question and to change the boundaries of his claim as originally occupied, and a subsequent change of claim as thus deliberately made of record and passed to final entry, and later to patent, can not be recognized, especially in the face of a valid adverse claim covered by an entry which by the record in no wise conflicts with the claim as thus made and patented.

If the denial of the Noyes petition by your office was proper at a time when, so far as the record showed, only Noyes and the United States were interested, and I see no good reason to dissent from that action, certainly the reasons for such denial become stronger when it is disclosed that Beebe has an entry of record covering the tracts involved, which, as before stated, was made when by the record the land was clear and subject to entry, and which would have to be canceled in order to grant the petition.

The motion is denied.

JURISDICTION—APPEAL—SUPERVISORY ACTION—SETTLEMENT.

NORTHERN PACIFIC R. R. CO. *v.* KNUDSON.

After a decision in a case by the General Land Office, and the expiration of the time within which an appeal may be filed, the question involved in said case is beyond the jurisdiction of said office.

The failure of a party to appeal from a decision of the General Land Office will not defeat the right and authority of the Secretary of the Interior, acting in his supervisory capacity, to consider the matters involved in said case.

A settlement right defeats a subsequent indemnity selection of the land covered thereby.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (F. W. C.)

With your office letter of May 13, 1891, were forwarded the papers in the case of the Northern Pacific Railroad company *v.* Andrew C. Knudson, involving the SE. $\frac{1}{4}$ of Sec. 25, T. 147 N., R. 58 W., Fargo land district, North Dakota.

Said tract was within the limits of the withdrawal ordered upon the filing of the map of general route of said road February 21, 1872, but upon the definite location of the road it fell within its indemnity limits and was duly selected on account of the grant March 19, 1883.

Knudson applied to file a pre-emption declaratory statement for this land on March 21, 1883, alleging settlement January 5, 1880. The local officers rejected his application for conflict with the company's selection, which action was sustained by your office decision of October 29, 1883, from which it appears that Knudson failed to appeal.

For some reason not disclosed by the record, but perhaps due to an inadvertence, the application of Knudson was again considered by your office in its decision of August 29, 1885, wherein it was held that As the alleged settlement antedated the company's selection, Knudson would be permitted to file his declaratory statement and in due time to make final proof, when, should he show settlement, residence, and cultivation as alleged, he will be permitted to perfect his entry.

From this decision the company appealed, but upon discovering that the application had been before considered by your office and decided adversely to the applicant, from which no appeal was filed, it asked to be permitted to withdraw its appeal from your office decision of August 29, 1885. It is in this condition that the record is transmitted for the consideration of this Department.

Independent of the question as to the respective rights of the parties upon the allegations made, it is clear that after the expiration of the usual time within which to appeal from your office decision of August 29, 1883, it was beyond the jurisdiction of your office to again consider said application, and the action taken by your office in again considering the matter in the decision of August 29, 1885, is clearly unwarrantable. But such failure to appeal would not prevent this Department from considering the matter under its supervisory authority.

In the case of the Pueblo of San Francisco (5 L. D., 483), it was held by this Department that:

When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary whether or not these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the despatch of business, not to defeat the supervision of the Secretary.

This decision was quoted with approval by the supreme court, in the case of *Knight v. United States Loan Association* (142 U. S., 178).

Under the third section of the act of March 3, 1887 (24 Stat., 556), it becomes the duty of this Department, upon proper application, to re-instate any pre-emption or homestead claim erroneously canceled for conflict with a railroad grant or withdrawal.

Under the repeated rulings of this Department the rejection of Knudson's application was improper, as he alleged settlement upon the land prior to the company's selection, and I have therefore to direct that a hearing be ordered, after due notice to both parties, in order to determine the status of the land at the date of the company's selection. You will proceed in the matter at your earliest convenience.

TIMBER AND STONE LANDS—OFFERED LAND.

FREDERICK V. JONES.

It was the intention of Congress under the provisions of the acts of June 3, 1878, and August 4, 1892, to except from purchase all timber and stone lands which belonged to the class of "offered" lands at the date of application to purchase the same.

Secretary Smith to the Commissioner of the General Land Office, February 16, 1895. (J. I. H.) (W. M. B.)

This is an appeal by Jones from your office decision of March 28, 1893, in the case of Frederick V. Jones, wherein was sustained the action of the local office in rejecting the application of the appellant to purchase, under the timber and stone act, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 8, T. 56 N., R. 22 W., 4th P. M., Duluth, Minnesota, land district.

It appears that the application of Jones was rejected for the reason that the tract in controversy was embraced in the class of "offered land," and therefore not subject to purchase under the provisions of the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348).

From that decision the plaintiff appealed, assigning as ground therefor specification of error as follows:

Error in holding that the tract applied for, although once offered, is excepted from the operation of the act of June 3, 1878.

The record shows that one Richard McCaffey, on February 4, 1892, made homestead entry for the tract involved; that said entry was canceled upon relinquishment November 5, 1892; and that the application of Jones to purchase was made the same day, to wit, November 5, 1892.

In your office decision above referred to it is stated that the said "township No. 56, was offered under proclamation 877, December 4, 1892, at \$1.25 per acre, and that the same has been increased in price;" and inspection of the records in the "Division of Public Lands" shows that the land in controversy was included in said offering. Further, the records in the "Division of Railroads" show that this land has never been embraced within the limits of any railroad grant.

The question raised in this case by appellant's attorney, as gathered from his line of argument, can be more fully presented and clearly expressed by a correct synopsis of the same than is set forth in his specification of error.

It is this: That the act of August 4, 1892, made no other change in the act of June 3, 1878, except to make the provisions of the latter act applicable to certain other "public land States" not included in the last mentioned act, and that

lands which were subject to entry as timber and stone lands at the date of the passage of the act of June 3, 1878, are still subject to such sale, as there is no subsequent act of Congress withdrawing them from the operation of the timber and stone act.

In other words, the contention of the appellant is that the land in controversy never having been offered at public sale prior to the passage of the act of June 3, 1878, the offering of the same at public sale according to law subsequent to the date of approval of said act does not exclude them from the operation of the provisions of that act.

In this case it is necessary to consider the effect of the act of June 3, 1878, as amended by the act of August 4, 1892. Those acts will not admit of the construction placed upon them by the appellant.

There were lands in the State of Minnesota of the character designated in the act of June 3, 1878, and the act of August 4, 1892, was not necessary to put them in the class of "offered" or "unoffered" lands, but it was necessary to subject them to purchase, and if they were offered lands at the time (August 4, 1892,) the act of June 3, 1878, became operative upon lands in said State of Minnesota under the amendment thereto, they were excluded from the operation of the act of 1878, *as amended*.

It was the evident purpose of Congress, under the provisions of the acts referred to, to except from purchase all timber and stone lands which belonged to the class of offered lands at the date of application made to purchase the same.

The tract in question being offered land at the time Jones made application to purchase the same, no error was committed in rejecting his application.

Your office decision is therefore hereby affirmed.

PRACTICE—APPEAL—CERTIORARI.

JHILSON P. CUMMINS.

Rule 82 of Practice applies only to appeals from the decision of the Commissioner of the General Land Office to the Secretary of the Interior.

The writ of certiorari will not issue unless it affirmatively appears that an injury has been done the petitioner by the decision on the merits of the case.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (E. M. R.)

This is an application for a writ of certiorari made by Jhilson P. Cummins from your office decision of July 19, 1894, involving the SE. $\frac{1}{4}$ of Sec. 24, T. 22 N., R. 7 W., Enid land district, Oklahoma Territory.

The record shows that the appeal by Cummins from the decision of the local officers had no evidence of service upon the adverse party of record, and for this reason your office decision of April 25, 1894, dismissed it.

July 19, 1894, your office refused to forward the appeal of Cummins, basing the action upon the authority of *Ream v. Larson*, 14 L. D., 176, "if no proper appeal was taken to you from the decision of the register and receiver, and if for that reason said appeal was dismissed by you, applicant is not now entitled to the right of appeal from your decision."

In the application for the writ it is urged that rule 82 of practice is applicable. That rule is as follows:

When the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice the appeal may be dismissed by the Secretary of the Interior and the case closed."

The petitioner is in error in his contention. The rule applies only to appeals from the decision of the Commissioner of the General Land Office to the Secretary of the Interior.

It is further alleged that there is no adverse party of interest, but inasmuch as the contrary is asserted by the decision complained of, and such assertion is not successfully contravened by the petitioner, the Department is in no position to pass upon the allegation. Even if the rule were otherwise no proper showing has been made that would authorize the issuance of the writ. It must affirmatively appear that an injury has been done the petitioner by the decision upon the merits of the case, and no such showing is made. The application is denied.

JAMES MARSTON.

Motion for review of departmental decision of December 22, 1894, 19 L. D., 577, denied by Secretary Smith, February 23, 1895.

RAILROAD RIGHT OF WAY—FORFEITURE—CERTIFICATE OF ENTRY.

MARY G. ARNETT.

The question as to whether a railroad company has forfeited its right of way privileges, granted under the act of March 3, 1875, by failure to construct its road within the period designated in section 4 of said act, is one that must be determined in the courts. The Department has no jurisdiction to pass on said question.

A clause, reserving the right of way, should not be inserted in final certificates of entry for lands over which a right of way has been granted under said act, where it appears that there has been a breach of the conditions imposed by said act, but no reassertion of ownership by the government, as, under the terms of said act, the rights of the company are protected without such reservation.

The case of the Pensacola and Louisville R. R. Co., 19 L. D., 386, cited and distinguished, and the case of the Dakota Central R. R. Co., v. Downey, 8 L. D., 115, modified.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (G. B. G.)

This proceeding is an application for a patent for the Toney Placer mining claim situated in the N. $\frac{1}{2}$ of Sec. 6, T. 1 N., R. 71 W., and in the SE. $\frac{1}{4}$ of Sec. 32 and the SW. $\frac{1}{4}$ of the N. $\frac{1}{2}$ of Sec. 33, T. 2 N., R. 71, Central City land district, Colorado.

The case is before me on appeal of Mary G. Arnett from your office decision of March 15, 1894, holding that the B. L. H. & M. P. Railroad Company retains the right of way through the Toney Placer, and directing that the right of way clause be inserted in the final certificate of entry.

The map of general route of the Boulder, Left Hand and Middle Park Railroad was approved by the Department January 17, 1882.

It is admitted that said railroad company has failed to construct any portion of its road over the ground covered by the Toney Placer, although a period of nearly thirteen years has elapsed since the approval of such map.

The contention is that the railroad company has forfeited its right of way by virtue of the statute.

The act of March 3, 1875, grants the right of way through the public lands of the United States to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road.

Section 4 of said act provides—

That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The question of what interest passed to the railroad company does not admit of argument. The language of the statute, "and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way," does not admit of construction or misconstruction, and shows clearly that the estate granted by said act is an incorporeal hereditament, an easement and not the land.

The contention that the railroad company has forfeited its right of way, by its failure to construct its road within the five years, as provided by said act, does not appear to be one for the consideration of this Department.

There can be no doubt of the general principle that a failure to keep a condition subsequent, does not forfeit the corporate existence of privileges, and that no one can take advantage of it, or complain of it, except the government making the grant, or imposing the condition. But the legislature has the power to provide that a corporation shall

forfeit its corporate privileges by any omission of duty, or violation of its charter, or default as to limitation imposed, and whether the legislature has intended so to provide, depends upon the construction of the language used in the grant.

In what manner the reserved right of the grantor must be asserted, depends upon the character of the grant.

If it be a private grant, that right must be asserted by entry, or its equivalent; if the grant be a public one, it must be asserted by judicial proceedings, authorized by law, the equivalent of an inquest of office at common law, or there must be some legislative assertion of ownership of the property on account of a breach of the condition. *Schulenberg v. Harriman* (21 Wall., 63), and cases cited.

This Department is then without jurisdiction to pass on the question of forfeiture, made therein; such act would be a judicial one, and requires the judgment of a court.

The question remains whether the right of way clause should be inserted in the final certificate of entry for lands over which a right of way has been previously granted to a railroad company, where it appears that there has been a breach of the condition by such company, but no reassertion of ownership by the government, in either of the two ways available under the laws.

In all cases, a patent for government land should conform to the final certificate of entry, and where a patent thus conforms to such final certificate, the certificate is as much a part of the patent as though it had been written therein in words and figures at length. *Ex-parte* Edward N. Marsh (5 L. D., 96-99).

It follows that if the right of way clause shall be inserted in the applicant's final certificate of entry, it would of necessity be incorporated in the patent.

The injustice to the patentee of placing such a limitation in the conveyance, is apparent when it is remembered that the patent is the strongest and best evidence of title, and the patentee would be thereby concluded in an action at law instituted against him by the railroad company for the possession of such right of way. The right of way clause should not then be inserted in the applicant's final certificate, unless it is necessary to protect whatever rights the railway company may have in the land by virtue of its grant.

Under the act of March 3, 1875, (*supra*), such protection does not appear to be necessary. The act itself affords ample protection to the company, if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is; "and thereafter all such lands over which such right of way shall pass, shall be disposed of, subject to such right of way." These lands are then disposed of, subject to such right of way, by virtue of the statute.

This is not a direction to the Land Department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad com-

panies as may have complied with the law. The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act.

In this regard, the case at bar may be distinguished from the recent case of the Pensacola and Louisville R. R. Co. (19 L. D., 386). In that case, the granting act did not impose a penalty of forfeiture on the company for failure to perform its conditions, nor did it direct that the lands over which the right of way was granted should be disposed of, subject to such right of way.

In the absence of such statutory protection, and it not appearing that the rights of the company had been forfeited by legislative enactment, or judicial determination, it became the duty of the Land Department to insert the right of way clause in all patents issued for lands over which such right of way had been granted.

The decision of your office is reversed. The case of the Dakota Central R. R. Co. *v.* Downey (8 L. D., 115), is modified in so far as it conflicts with this opinion.

PRACTICE—FINAL JUDGMENT—WITHDRAWAL.

JAMES *v.* KOONS.

A final judgment of the Department will not be revoked, or otherwise disturbed, on the sole ground that the party in whose favor it is rendered refuses to avail himself of its terms.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (W. F. M.)

This Department is in receipt of your office letter of October 11, 1894, transmitting a withdrawal, filed September 20, 1894, by counsel of George W. Koons of his application for a deed to lot 10, block 21, Oklahoma City, which was awarded to him by departmental decision of October 10, 1894, in the above numbered and entitled cause. (19 L. D., 266.)

Koons may withdraw his application for deed at any time before the issuance of patent, notwithstanding the award in his favor, but a final judgment of this Department will not be revoked, set aside or otherwise disturbed on the sole ground that the party in whose favor it is rendered refuses to avail himself of its terms.

The withdrawal is, therefore, returned to your office to be acted on in accordance with the foregoing views.

APPLICATION TO ENTER—SETTLEMENT RIGHT.

CLANCY ET AL *v.* HASTINGS AND DAKOTA RY. CO. (ON REVIEW).

An application to enter properly rejected, on the ground that the land is covered by the existing entry of another, and pending on appeal, confers no right upon the applicant as against a settler on the land, in the event that the prior entry is subsequently canceled; and where the settler in such case is allowed to make entry pending said appeal, his entry will not be canceled.

An application to enter land covered by the entry of another can not be regarded as a contest against said entry.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (E. M. R.)

On December 26, 1893, the Department rendered a decision in the above entitled case involving the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and lot 4, Sec. 5, T. 112, R. 34, Redwood Falls land district, Minnesota (17 L. D., 592).

This is a motion for review of that decision by M. J. McLaughlin in so far as it directed the cancellation of his homestead entry for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 4, of said section, township and range, for the reason that his application and entry had been made subsequent to the application of Robert E. Simmons to make homestead entry of the same land.

The record shows that James Clancy made homestead entry of the above described tract May 28, 1885.

On July 25, 1885, Robert E. Simmons applied to make homestead entry of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 4, and Albert M. Simmons made a similar application for the remaining lands, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$. These applications were rejected because of the entry of Clancy and the applicants appealed.

Your office decision affirmed the action of the local officers in rejecting these applications and the Department returned the case to the General Land Office in view of the fact that the tract was shown to be within the indemnity limits of the grant for the railroad company which was claiming the land, and whose rights had not been adjudicated by the land office.

On June 7, 1886, while the case was pending before the Department, Clancy filed a relinquishment at the local office for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 4, the land applied for in the application of Robert E. Simmons, and Michael J. McLaughlin, a settler upon the land, was allowed to make homestead entry of the same.

McLaughlin, on September 17, 1888, commuted his entry to cash, and James Clancy on January 18, 1890, following, did the same for the remaining portion of the tract which was covered by the application of Albert Simmons.

It is further shown that these lands were excepted from the operation of both withdrawals for the benefit of the Hastings and Dakota Railway company. The first withdrawal was on May 31, 1873, but the lands at that time were not subject to selection. In 1881 a new selection was made, but as no lands were designated as being lost, as a basis for such selection, it was held that as this selection was made under the regulations of 1879, in the absence of a specification of loss that a right initiated by a prospective homesteader should be a bar to the selection of the railroad, if such right was initiated prior to the filing of the specification of loss by the railroad company.

The decision therefore held for cancellation the company's selection to that portion of the land covered by the entry of McLaughlin and that the application of Robert Simmons, which was at that time pending before the Department upon appeal from your office decision, reserved the land from any other appropriation by the local officers, and that the entry was illegal and erroneously allowed to go of record, and in consequence that the entry of McLaughlin should be canceled. It was further held in reference to the portion of the land still covered by the entry of Clancy, that the selection of the company in 1873 was in all respects regular under the regulations governing the selection of indemnity lands in force when such selection was made, and that therefore the selection was entitled to due consideration unless it should be shown that there was no authority to permit this selection in the manner made, or that the company had since been required to amend the same and had failed to comply with the requirement, and therefore, in consideration of what has heretofore been set out, it was held that the selection was not here for approval but was a bar to Clancy's entry, which was accordingly canceled. It also rejected the application of Albert M. Simmons for the tract.

I am of opinion that the former decision of this Department was erroneous.

The rights of Robert Simmons and of Albert Simmons depend entirely upon their ability to show that their applications to enter were erroneously rejected. This is the only right they had, and upon the state of the record at the time of the making of their application their cause must be disposed of.

Their applications were not improperly or erroneously rejected; the land at that time was covered by the entry of James Clancy, which segregated the land involved from the public domain and as long as it remained of record there was no other course left open to the local officers but to reject any and all applications to make homestead entry of the land.

It would not be improper in this connection to add further that this Department can not regard the applications of Robert and Albert Simmons as in reality a contest, because in order to initiate a contest an affidavit of contest has to be filed and duly corroborated, which was

not done in this case. If instead of making an application to enter and prosecute whatever rights they then had by appeal, they had filed an affidavit of contest, in view of the facts hereinbefore set out and the law heretofore applied, it will be readily seen that they could have secured the land, but not having seen fit to pursue that course, but instead thereof having contented themselves with a naked application to enter, they have no such standing before the Department as entitles them to a favorable judgment.

This was the status of the case at the time of the filing of the relinquishment of James Clancy. As soon as that relinquishment was filed the land became a portion of the public domain and the rights of McLaughlin, as a settler upon the tract, attached. The entry will be allowed to stand, and for this purpose and the furtherance of this end, the former decision of this Department is hereby reviewed, revoked and set aside.

PRACTICE—CERTIORARI—DILIGENCE.

WILLIAM MINTO.

The writ of certiorari will not issue where it is apparent that the applicant has not been diligent in the prosecution of his claim before the Department.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (W. F. M.)

On the 5th day of March, 1885, William Minto, a United States deputy surveyor, made a contract with W. H. Brown, surveyor-general for the State of California, for the survey of certain lands within the Mission Indian reservations, to be designated by the Indian Agent, J. G. McCallum.

Work was done under this contract amounting in the aggregate to \$2,732.51, and on April 10, 1886, the account was approved by the surveyor-general.

During the month of May, 1887, an examination of the surveys in the field was made by Charles F. Conrad, a special agent of the General Land Office, who early in June following forwarded an unfavorable report to the Commissioner of the General Land Office. Acting upon this report your office, on June 23, 1887, addressed a letter to the surveyor-general, in which was recited, at some length and particularity, the grounds of the action taken rejecting all of Minto's surveys.

On June 12, 1894, there was filed in this Department a sworn application by Minto for a certiorari, by virtue of which he invokes the exercise of the supervisory power of the Department, to the end that a hearing may be ordered and held to enable him to make answer to the charges of Special Agent Conrad, and for the purpose of ascertaining whether or not the surveys were made as required by the surveying manual, and were properly and favorably executed. The application was referred to your office on June 12, 1894, and I am now in receipt of

your office letter of November 19, 1894, in which it is shown that no action was taken in the matter after the date of the rejection of the returns of the survey on June 23, 1887, until the filing of the application.

The apparent laches of Minto having been brought to the attention of his attorney, Theodore Wagner, at Berkeley, California, the former has filed an affidavit alleging that within a few days after he was notified of the action of your office rejecting his surveys, he wrote a letter, addressed to your office, requesting to be furnished with a copy of the report of the special agent, and asking a hearing at which he might produce evidence that said surveys were properly made, and that he delivered the letter to the surveyor-general, with the request that it be forwarded to your office; that after some months lapse of time he inquired of the surveyor-general if any answer had been received to his letter, and that at various times since then he has made inquiry at said office, but has never received any reply to said request.

The surveyor-general of California was directed to make a careful and thorough search for any evidence of record in his office of the filing of any such letter as that claimed to have been filed by Minto, and by letter of August 2, 1894, he reported that after diligent search the records of his office fail to show the receipt of such an application or letter.

It appears, therefore, that very nearly seven years had elapsed before Minto took any emphatic action looking to the correction of the alleged error of your office, and even conceding, for the sake of argument, that he did file a letter, as alleged, with the surveyor-general, for transmission to your office, it is apparent that he did not follow that action up with such enterprise and diligence as to now warrant this Department in re-opening a matter passed on and settled by your office more than seven years ago.

Minto's rights, if any he had, have been lost by his laches, and his application is, therefore, denied.

RAILROAD GRANT—INDEMNITY LIMITS—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* FLANNERY.

The Northern Pacific R. R. Co. acquires no rights within the indemnity limits of its grant prior to selection.

The purchaser of a possessory right who settles on a tract of land and occupies and improves the same, does not forfeit his settlement right as against a railroad grant by subsequently attempting to secure title through the company, where such action is taken to protect said settlement right, and is repudiated by the settler as soon as he learns that the land is subject to entry.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (F. W. C.)

I have considered the appeal by the Northern Pacific Railroad company from your office decision of May 1, 1891, holding for cancellation its indemnity selection of the NE. $\frac{1}{4}$ Sec. 15, T. 8 N., R. 12 E., Helena

land district, Montana, with a view to allowing the homestead application of Frank Flannery presented for the same.

The land was originally withdrawn upon the filing of the map of general route of the Northern Pacific Railroad company but upon the definite location of said line of road the land fell within the indemnity limits and selection was made on account thereof February 26, 1885.

On December 4, 1886, Flannery filed an application to make homestead entry for this land, which was rejected for conflict with the company's selection, from which action he appealed to your office.

In his homestead affidavit he alleged settlement upon the land in question in October, 1882, and by your office letter of June 20, 1883, the local officers were directed to advise Flannery that he must show by competent testimony that the land was not subject to the company's selection at the date of its presentation of its list covering this tract.

By letter of January 7, 1889, the register forwarded an affidavit by Flannery, executed November 19, 1888, in which he alleged settlement upon the land April 1, 1883, and that he had since continued residing upon and had continued to improve the land.

In this affidavit he also alleged that shortly after making settlement upon the land in question he was informed that the land was included within the indemnity limits of the railroad grant, and that title could only be procured through the company; that thereupon he entered into an agreement with the company for the purchase of said land and made payments at various times on account thereof, aggregating between three and four hundred dollars; that as soon as he learned that he was entitled to make entry under the public land laws he discontinued his payments under the contract with the company and that he had at all times resided upon and claimed the land as his home.

Upon this affidavit hearing was ordered and from the testimony it appeared that in 1882 Flannery purchased the improvements of a prior settler upon this land, who gave him possession; that he made actual settlement thereon in February, 1883, and that he has since resided continuously upon the land, cultivating and improving the same, his improvements at the date of the hearing being valued at the amount of \$1,000.

The testimony taken at the hearing makes no reference to the contract entered into between Flannery and the company for the purchase of this land, the only evidence of this contract or agreement being, as before stated, as set forth in his affidavit in support of his homestead.

Upon the showing as thus made your office decision found that he settled upon the land for the purpose of obtaining title thereto under the public land laws, and not with the consent of the company, with a view of obtaining title through it, and therefore it is stated:

This is the more obvious from the fact that notwithstanding he had paid the company \$400 he repudiated the agreement as soon as he was informed that he could obtain the land under the settlement laws.

Your office decision therefore holds that Flannery had such a claim to the land upon February 26, 1885, the date of the company's selection, as to render the same not subject to indemnity selection, and, as before stated, the company's selection was held for cancellation with the view to the allowance of Flannery's application.

An appeal brings the case to this Department.

It is first urged in the appeal that these lands having been withdrawn in 1872 were not subject to settlement by Flannery in 1883, as alleged, and second, that if it should be held that the lands were at that time subject to settlement, Flannery was not such a settler at the date of the company's selection, as would bar its right to make selection, he having previously entered into an agreement to buy the land of the company.

Upon the first ground it has been repeatedly held by this Department that no rights are acquired within the indemnity limits of this company, prior to selection, and that all withdrawals made of indemnity lands on account of this grant were in violation of law. It must, therefore, be held that the land was subject to settlement at the time Flannery is alleged to have made settlement thereon in 1883, and it but remains to consider whether his claim to the land at the date of the company's selection was such as would bar indemnity selection.

There can be no question, under the testimony, but that at the date of selection, and for more than two years prior thereto, this land was in the possession and occupation of Flannery, and while it is true that he admits a previous agreement with the company to purchase of it its title to this land, yet I do not think that the showing made is sufficient to avoid his settlement.

It is clear that he did not go upon the land in accordance with a previous agreement made with the company; in other words, the company did not put him in possession of the land, for it is clearly shown that he purchased the improvements of a prior settler, and that it was not until after he had lived upon the land for sometime that he learned of the adverse claim of the company.

Learning of this adverse claim on account of the grant and in order to protect himself in his possession he contracted with the company for the purchase of this land, and on account thereof made payments as before stated, but as soon as he learned that he would be permitted to make entry under the settlement laws he repudiated the contract with the company and made application under the homestead laws, as before stated.

From a careful consideration of the entire matter I affirm your office decision and hold that his right under his settlement existed at the date of the company's selection and was a sufficient bar to such selection, and that his previous agreement made with the company, repudiated as before stated, will not prevent his claiming settlement and residence during the existence and recognition of such agreement.

I am therefore of the opinion that Flannery should be permitted to complete entry upon his application heretofore made, and thereupon the company's selection of this land will be canceled.

HOMESTEAD ENTRY—HEIRS—REINSTATEMENT.

GREENLAW *v.* NORTHERN PACIFIC R. R. CO. ET AL.

Where a homesteader dies, and his widow fails to submit final proof within the statutory life of the entry, abandons the land, and another settles thereon, there are no rights left under said entry to descend to the children (on the subsequent death of the mother), that warrant the reinstatement of said entry.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (A. E.)

This is an appeal from your office decision of September 7, 1892, denying the application of the heirs of Leonard Greenlaw to have the homestead entry of their ancestor, made September 1, 1863, re-instated.

The land involved is the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 4 and 5, Sec. 3, Tp. 20 N., R. 2 W., Olympia, Washington.

The facts contained in the record show that Greenlaw was killed in 1868, but before he had made final proof on his claim; that his wife, who was an Indian woman, continued to reside on the claim, with the two children of deceased, until about 1876, although often away from the place during that period. In the latter year she apparently abandoned the place, not returning thereafter. Meantime, however, the local officers finding that the entry of Greenlaw had existed beyond the seven years limit, cancelled the same of record in the year 1871.

The land being apparently abandoned after the year 1876, or 1877, it was settled upon by other parties at different times until in 1888 one Haskell went upon it and has continued a settler thereon up to the hearing at the local office from which the appeal under consideration grew.

On December 3, 1891, Julia Greenlaw, aforementioned widow of deceased entryman Greenlaw, filed an application in the local office to have the entry of deceased re-instated for the benefit of herself and children. This was duly forwarded to your office.

The land being within the limits of the grant to the Northern Pacific Railroad, was selected by that road on September 21, 1888.

On April 13, 1892, your office ordered a hearing to determine the status of the land on May 14, 1874, the date when the railroad map of definite location was filed. This hearing was held on July 26, 1892, after which the local office recommended that the entry be re-instated for the benefit of the heirs, the mother having since died.

On appeal, your office on July 13, 1893, after disposing of the railroad claim, in accordance with the decision in *Barden v. Northern Pacific Railroad Company*, 145 U. S., 535, held that the entry having

been cancelled in 1871, after report of the local officers that notice had been given and no action taken, Haskel had acquired rights that would bar reinstatement.

From this an appeal has been filed by attorneys claiming to represent the heirs, though the record does not contain either an appearance on their behalf nor authority for any one to represent them.

The only question to determine is, whether the rights initiated by Leonard Greenlaw were of a character which would in this case remain to his heirs.

By virtue of section 2290 Revised Statutes, the widow of Greenlaw was entitled to make final proof on the land within seven years from the date of entry. She having neglected to do this through ignorance of law, and having finally wholly abandoned the claim, she lost her rights in the premises long before her death. As the children could have no rights until the death of the mother, and then only such as the law gave her, in this case they inherited nothing.

The land was abandoned of record and in fact when Haskel settled upon it, and had been so abandoned for over ten years. The legal title was in the government, and by reason of that Haskel was induced to enter thereon and make valuable improvements.

From all of which it is clear that your office decree should be upheld, and the same is therefore affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

RUTLEDGE *v.* LENNON ET AL.

The sale of the standing pine timber on land, by a railroad company, is a sale of an interest in the land, and the purchaser in good faith of such interest, the chief value of the fee, is entitled thereby to acquire the entire title to such land by paying the government price therefor, as provided by section 5, act of March 3, 1887.

The fact that such purchaser had not, at the date of his purchase, filed his declaration of intention to become a citizen, will not defeat his right to perfect title under said section, where it appears that prior to the date of his application such declaration was duly filed.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (C. W. P.)

I have considered the case of Edward Rutledge against Patrick Lennon *et al.*, involving certain land in the Ashland district, in the State of Wisconsin, on appeal of Patrick Lennon and others from your office decision of May 29, 1894. Reference is made to said decision for a description of the lands in controversy. They are in odd-numbered sections in townships 44 and 45, N., R. 4 W., within the fifteen miles, or indemnity limits of the grant of June 3, 1856, (11 Stat., 20) to the State of Wisconsin, to aid in the construction of what is now known as the

Chicago, St. Paul, Minneapolis and Omaha Railway Company (Bayfield branch), and also within the additional four miles to the primary limits under the act of May 5, 1864, (13 Stat., 66); and are also within the primary limits of the grant of the said act of May 5, 1864, for the Wisconsin Central Railroad Company. It was held by the Department that the Wisconsin Central Railroad Company could not go within the fifteen miles limits of the Omaha road for any lands whatsoever, because the lands within said limits were reserved from the grant to the Wisconsin Central road; and it was further held that the Omaha Company was entitled to one undivided half of the lands within the additional four miles strip and that the other half belonged to the government. With the exception of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 13, T. 45 N., R. 4 W., the tracts in question were listed by the Wisconsin Central Railroad Company, July 12, 1887, per list No. 1. The company's listing of the tracts was cancelled February 12, 1890.

The Omaha Company designated lands which, in the aggregate, amounted to one-half of the lands within the four miles strip, and upon the adjustment of the grant to the Omaha Company, the tracts in question were restored to the public domain.

On April 11 and June 17, 1885, the Wisconsin Central Railroad Company executed two instruments, whereby it sold to Rutledge the standing pine timber on the tracts in question, with others, for the consideration of \$22,165.50.

March 3, 1891, Rutledge made application to purchase said tracts, under the provisions of section five of the act of March 3, 1887, (24 Stat., 556).

Pursuant to the published notice of this application to purchase, Patrick Lennon, J. H. Lennon, Frank Jentz, Fred. Jentz, Robert J. Parker, August Pukall, Hans Peterson and Malcolm Wilson appeared and protested against the allowance of Rutledge's application. Several of the protestants submitted testimony as to their settlement on the tracts claimed by them, respectively.

The local officers held that the testimony presented showed that Rutledge had only purchased the pine timber standing on the tracts in question, and was therefore not entitled to purchase the land under the act of March 3, 1887. From this decision Rutledge appealed to your office.

Afterwards, Albert Schultz, Henry Baumgarten, David Younger, Martin Ensigner, Jacob Heiner, John Stoeger, August Pukall, Mary A. Lennon, Malcolm Wilson, John H. Lennon, Frank Russell, Robert J. Parker, Frank Jentz, Fred. Jentz and Patrick Lennon applied to make homestead entry of certain tracts embraced in Rutledge's application. Their applications were rejected. They appealed to your office, which affirmed the decision of the local officers, rejecting the applications to enter. A further appeal brings the case to the Department.

The good faith of Rutledge in the purchase of the standing pine timber on the land, cannot be questioned. The evidence submitted shows that the standing timber on the land constituted the chief value of the freehold, and that it comprised not only an interest, but the paramount interest in the freehold.

While it did not include the fee, it did include that which made the fee desirable. It was the interest which would really be considered when the fee was purchased. It was the substantial valuable portion of the fee, the portion worth protecting by a remedial statute.

I quote the words of the well considered case of *Telford v. Keystone Lumber Company* (18 L. D., 176), where it was held that the sale of the standing timber on land, by a railroad company, is a sale of an interest in the land, and the purchaser of such interest is entitled thereby to acquire the entire title to such land by paying the government price therefor, as provided by section five of the act of March 3, 1887.

None of the protestants, or homestead applicants, claim settlement prior to 1890, and the second proviso

applies only to the case of lands which, at the date of the passage of the act, had been settled upon subsequent to December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws. *Chicago, St. Paul, Minneapolis and Omaha Railway Company* (11 L. D., 607) and *Union Pacific Railway Company v. McKinley* (14 L. D., 237).

The objection that Rutledge had not declared his intention to become a citizen, at the time of his purchases from the Railroad Company, and therefore was not within the remedy of the act, is without force. The act was not intended to confirm sales made by the railroad company, but to afford citizens, or persons having declared their intention to become such, who were bona fide purchasers of land to which the company had no title, a means of acquiring title from the government, (11 L. D., 229, and 16 L. D., 273), and Rutledge had declared his intention to become a citizen before he applied to purchase under the act.

The decision appealed from is therefore affirmed.

PRACTICE—APPEAL—BOARD OF EQUITABLE ADJUDICATION.

OSCAR WALLER ET AL.

An appeal will properly lie from the denial of an application to have an entry referred to the Board of Equitable Adjudication.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (E. M. R.)

This case involves mineral entry No. 449, for the Waller No. 1 lode claim, Rapid City land district, South Dakota.

The record shows that Oscar Waller *et al.*, of date March 9, 1891, made a mineral entry, and received proper certificate of entry, for the above described land. November, 1891, one Joseph Snyder filed his

certain affidavit protesting against the issuance of the patent on said mineral entry, charging that he had located the land in 1878 as a mill-site; that the land was non-mineral in character; that there had been no discovery of a vein or lode by the mineral claimants; and, that the proper amount of expenditure had not been done upon the land; and further, that the order of publication had been improperly allowed and made.

Upon the hearing ordered on the case thus joined, your office held that the land was mineral in character; that five hundred dollars had been expended thereon, but the publication had been improperly made, and therefore ordered a republication. This decision was rendered on September 12, 1883, and from this no appeal was filed by either of the parties.

On February 14, 1894, your office held the case closed. Thereafter the mineral claimants moved a reconsideration of the decision of February 14, 1894.

On April 30, 1894, the motion was denied by your office decision of that date.

Waller *et al.* moved that the case be referred to the board of equitable adjudication. On July 17, 1894, the Commissioner of the General Land Office overruled this motion, and appeal being filed, on August 22, 1894, the Commissioner dismissed and denied the right of Oscar Waller to appeal; whereupon an application is made for the issuance of a writ of *certiorari*, directed to you to certify and forward to the Department the record in the case.

There is no evidence of service upon the opposite party, Joseph Snyder, but inasmuch as his attorney makes a general appearance here and argues the merits of the case, it will be deemed that the objection on this score has been waived.

The publication which was held to be insufficient and improperly made, was so determined because the order for publication was signed by the receiver, and not by the register as required under the section 2325 of the Revised Statutes of the United States.

The argument presented before your office with the application that the case be referred to the Board of Equitable Adjudication, was based upon the ground that there was no adverse party of record, for the reason that your office having determined between the parties of this suit that the land was mineral in character, that question became *res judicata* as between these parties, and that the mill-site claimants could not now succeed in establishing their claim as the law provided that mill-sites could not be established upon mineral land; that having failed to appeal from the decision and having allowed it to become final, the protestant would be forever barred from again raising any question as to the character of the land.

There being, therefore, no adverse party of record, it was further urged that the error in the former publication was of such a nature

that a board constituted as the board of equitable adjudication is, would hold that this was not such an error as would defeat and render void the publication theretofore made, and would confirm the entry.

The reason that claimant did not appeal from your office decision was that he desired the decision to become final in order that he might present his application to the board of equitable adjudication. This he would not have been able to do were the decision still prosecuted by way of appeal, as in such an event, the decision not being final, the board would have no authority to pass upon the case. On the other hand, it was maintained that the claimant was occupying the anomalous position of holding the decision to be final as against the protestant and not final as to the mineral claimants.

Your office denied the right of appeal for the reason that an application to refer the case to the board of equitable adjudication rests within the sound discretion of the Commissioner, from the exercise of which no appeal would lie.

I do not concur in this view of the law. The Secretary of the Interior, under the established rulings of the Department and the law of the land, is invested with authority to amend, to alter, to review, to reverse, or to affirm all matters relating to the disposal of public lands. This is true of equitable as well as of legal rights.

Whether this case is one which can be properly submitted to the board of equitable adjudication will be passed upon when the case is before the Department. The various questions presented by the record will then be considered.

For the reasons stated the application for writ of *certiorari* is granted and you will certify to this Department the record in the case.

PRIVATE CLAIM—JURISDICTION—ACT OF MARCH 3, 1891.

PERALTA GRANT.

Since the repeal of section 8, act of July 22, 1854, by the act of March 3, 1891, the Department is without jurisdiction over Spanish and Mexican private claims in Arizona.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (J. I. P.)

On October 12, 1889, the surveyor-general of Arizona, in response to a letter from William A. Stone, Acting Commissioner of the General Land Office, of date September 24, 1889, submitted an able and exhaustive report in relation to the alleged "Peralta" grant, in which he found that the claim was fraudulent and "without the slightest foundation in fact and utterly void."

Upon examination of that report and the record accompanying it, your office, by letter of February 20, 1890, directed the surveyor-general of Arizona to strike the case from his docket.

From that action of your office the claimants have appealed to this Department.

The only jurisdiction, or authority, which the Secretary of the Interior, and under his instructions, the surveyors-general of the different States and Territories, ever had in the matter of Spanish and Mexican land grants, was by virtue of section 8 of the act of July 22, 1854 (10 Stat., 308), under the provisions of which the surveyor-general of Arizona presumably acted in compiling the report of said grant transmitted to your office on October 12, 1889.

That section was specifically repealed by section 15 of the act of March 3, 1891, entitled, "An act to establish a court of private land claims, and to provide for the settlement of private land claims in certain States and Territories" (26 Stat., 854).

Without passing on the question of the authority of the Commissioner of the General Land Office to direct the surveyor-general of Arizona to strike said case from his docket, and without going into the merits of said grant as presented by the voluminous record in the case, I am of the opinion that the Department is without jurisdiction in the premises.

The appeal is therefore dismissed.

OKLAHOMA LAND—SETTLEMENT RIGHTS—APPLICATION TO ENTER.

MCMICHAEL *v.* MURPHY *et al.* 197 U.S. 304

The homestead entry of one who enters the territory prior to the time fixed therefor is not void, but voidable, and while of record segregates the land covered thereby. Settlement on land while it is covered by the entry of another confers no right as against the entryman or the government.

The right of a settler who is residing on land covered by an entry of another attaches *eo instanti*, on the cancellation of said entry, without any specific act of settlement on his part at such time, if he is then in possession of said land.

A protest filed by a third party, during the pendency of a contest, setting up his own claims to the tract, and protesting against the recognition of any claims, save his own, in the event of the cancellation of the subsisting entry, does not confer upon said party the status of a contestant, nor any right as against one claiming under a subsequent relinquishment.

Where a relinquishment is filed during appeal in a contest case, the land is open to the first legal applicant.

An application to enter made after final judgment of cancellation and within the time allowed for appeal should be received, but not made of record until the time for appeal has expired, or the rights of the entryman on appeal have been determined. An application so received and pending should be placed of record, if the entry under attack is relinquished.

Secretary Smith to the Commissioner of the General Land Office February 25, 1895. (J. I. H.) (J. I. P.)

I have considered the appeal of the plaintiff in the above entitled cause from your office decision of January 18, 1893, rejecting his claim to the SW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 3 W., Oklahoma Territory, and

holding intact homestead entry No. 223, made November 30, 1890, by the defendant for said tract.

Briefly stated, the facts in the case are as follows:

April 23, 1889, Evers White made homestead entry No. 6 for said tract.

April 24, 1889, Charley J. Blanchard made homestead application for the same tract.

May 1, 1889, Vestal S. Cook made homestead application for the land.

The applications of Blanchard and Cook were rejected because of White's entry.

April 27, 1889, Blanchard filed an affidavit of contest, attacking White's entry.

May 1, 1889, Cook also filed an affidavit of contest.

July 16, 1889, the case went to trial, each party charging that the other two had entered the Territory of Oklahoma prior to 12 o'clock noon of April 22, 1889, in violation of law and the President's proclamation.

The local office recommended the cancellation of White's entry, and dismissed the contests of both Cook and Blanchard. On appeal your office, on March 7, 1890, affirmed this decision, and on further appeal, this Department, on July 21, 1891 (13 L. D., 66), affirmed your office decision as to Cook and Blanchard, White, pending appeal here, having filed his relinquishment, November 29, 1890.

Your office letter of August 15, 1891, transmitted notice of said departmental decision to the local office, with the advice that the case was closed, White's entry canceled, and the tract open to the first legal applicant. Subsequently, on September 11, 1891, on further examination of the record, it was discovered that while the case of Blanchard *v.* White *et al.* was pending on appeal, an affidavit of contest against White's entry had been filed by one Charles Renfro, based on the same charges made by the other parties, with the additional charge that for the reasons urged against White, neither Blanchard nor Cook were qualified entrymen. That on July 22, 1889, one Johnson M. Fuller had filed an affidavit of contest against White's entry, on substantially the same charges. That on August 31, 1889, William T. McMichael filed an affidavit, alleging that he had made settlement on the land June 3, 1889, had lived thereon in a tent with his family until August 2, 1889, when he was ejected therefrom by the military, at the instance of White. That his rights were superior to those of White, Blanchard or Cook, all of whom were disqualified by reason of having entered the Territory during the prohibited period, and that the rights of Renfro and Fuller were junior to his. That he made an application to enter said tract July 19, 1889, which was rejected because it conflicted with White's entry. That he was the only qualified settler on the tract entitled to make entry thereof, and he protested against any other person being permitted to enter the land.

January 1, 1890, Renfro made application to enter the land, and on its rejection he appealed to your office.

March 11, 1890, Levi Holt, through an agent, filed a soldier's declaratory statement for the land, which was suspended, pending final action on the case of *Blanchard v. White et al.*, and on November 29, 1890, White's entry was canceled on his relinquishment, and this defendant was permitted to make homestead entry No. 223, as stated, White's relinquishment was filed on Saturday. On the following Monday bright and early this plaintiff was on the land with his family, and has resided there ever since. On December 4, 1890, the plaintiff filed another application to enter said land, it having been learned that his former application did not correctly describe the land. It was rejected for conflict with defendant's entry. Plaintiff appealed, alleging that the defendant's entry was wrongful, in that he, with others, had conspired to have the defendant enter said land, in order to plat it as an addition to Oklahoma City, and re-affirming his prior right by virtue of his settlement, as above set forth, and alleged that White's relinquishment was the result of his protest and contest.

Your office, September 11, 1891, by letter "H," dismissed the contests of Renfro and Fuller, rejected Holt's application, and ordered a hearing between this plaintiff and defendant. That hearing was had February 15, 1892, before the local office, both parties being present in person and by attorney. The local office decided adversely to the plaintiff, who appealed to your office, which, on January 18, 1893, affirmed the decision of the local office. From that decision the plaintiff has appealed here. Renfro and Fuller having failed to appeal from the decision against them, are eliminated from the case.

Your office decision of January 18, 1893, closed the case as to Holt, on the ground that he had been notified of your office decision of September 11, 1891, and had failed to appeal therefrom. Since McMichael's appeal has reached this Department from your office decision of January 18, 1893, the appeal of Holt from your office decision of September 11, 1891, has been forwarded here. It appears that it was regularly filed in due time, and that the delay in its transmission was due to the inadvertence and negligence of the local office in allowing it to become misplaced among the papers there. Said appeal was duly served on both McMichael and Murphy, so that the controversy becomes a three-cornered one between McMichael, Murphy and Holt.

McMichael bases his claim on his alleged settlement on the tract in May or June, 1889, while it was covered by White's homestead entry; that White, Blanchard and Cook were all disqualified by reason of having entered the territory during the prohibited period; that White's entry was therefore void; McMichael the first qualified settler on the tract, and that White's relinquishment was filed because of his protest affidavit, filed in August, 1889, and that Murphy's entry is void because in violation of Rule of Practice No. 53.

Holt bases his claim on his application filed March 11, 1890, four days after the decision of your office, holding White's entry for cancellation, and before appeal was taken therefrom.

Murphy's claim is based solely on his entry, made November 29, 1890, on the filing of White's relinquishment.

McMichael urges strenuously that White's entry was void and asks a specific ruling on that proposition.

Although White had entered the Oklahoma country during the prohibited period, yet his homestead entry was *prima facie* valid. Its invalidity had to be established by extraneous evidence, and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done, the tract covered by said entry would have remained forever segregated from the public domain; so far, at least, as the unquestioned legality of the entry itself could accomplish that fact. Hence it cannot be regarded as void, but voidable only. True White lacked one of the essential qualifications of an entryman for Oklahoma lands. But it has been held that the entry of an alien (who also lacks the very essential qualifications of citizenship) is not void but voidable. (Leary v. Manuel, 12 L. D., 345; Hollants v. Sullivan, 5 L. D., 115; Pfaff v. Williams *et al.*, 4 L. D., 455; St. Paul Minneapolis and Manitoba R. R. Co. v. Forseth, 3 L. D., 446.) Being voidable only, White's entry segregated the land so long as it remained of record. (Leary v. Manuel, *supra.*) Hence he was entitled to its possession, it being exempt from further settlement or entry, until his entry was canceled or declared forfeited. (Carroll v. Safford, 3 Howard, 441; Wither- spoon v. Duncan, 4 Wall., 410.)

McMichael's settlement on the tract in question in May or June, 1889, while it was covered by the homestead entry of White, gave him no rights whatever as against either White or the government. (McAviney v. McNamara, 3 L. D., 552; Kruger v. Dumbolton, 7 L. D., 212; Hall v. Levy, 11 L. D., 284; Lough v. Ogden, 17 L. D., 171.)

It has been held by the Department that where a settler is residing on a tract covered by an entry, at the date of the cancellation thereof his rights as a settler attached *eo instanti*, without any specific act of settlement on his part. (See authorities above cited, and Pool v. Moloughney, 11 L. D., 197, and authorities there cited.) But the right of a settler in such case attaches only where he is in possession of the tract when the entry is canceled. (Barrott v. Linney, 2 L. D., 26; Corrigan v. Ryan, 4 C. L. O., 26.)

McMichael was not on the tract when White's entry was canceled. He cannot be heard to say that he was deprived of any right on account of his ejectment by White, because he had none to lose. He was a trespasser on the tract, and White had a right to eject him therefrom. Hence he acquired no rights whatever by virtue of his alleged settlement. Had White permitted him to remain on the tract, and had he been residing there when White's entry was canceled, a different ques-

tion would be presented. When White therefore filed his relinquishment November 29, 1890, McMichael had no right or legal claim whatever to said tract, unless that relinquishment was caused by McMichael's protest filed August 31, 1889, which would have entitled him to the preference right of entry. And this brings us to the examination of that question.

That protest I have examined with care. It was filed not long after the local office had held White's entry for cancellation, and refers to that fact. It sets forth the entire history of said tract from the opening of the territory down to the day said instrument was filed. It declares the entry of White to be void, and the claim of Blanchard and Cook of no effect for reasons hereinbefore stated. It asserts that McMichael's claim to the land is paramount to all others, by reason of his settlement as above set forth. It recites the ejection of McMichael from said tract by the military at the instigation of White, and that he is kept off said tract by White's threats and intimidations. After giving an account of the rejection of McMichael's application to make homestead entry on July 19, 1889, it states that

affiant herewith tenders his application and affidavits to enter said land as a part of this protest, and now asks that when said entry of White is canceled, that they be received and filed by the U. S. Land Office and a certificate be executed to him by the receiver.

He then protests against any other person being permitted to enter said land, and requests that if any such attempt is made that a hearing as to affiant's rights be had, and that he be awarded the right to enter said land.

Such is the instrument which McMichael claims caused White's relinquishment, and entitles him to the preference right of entry as against Murphy. It is an information, a declaration, a protest, and a prayer. An information of all the facts and circumstances connected with said grant down to the filing of said affidavit; a declaration of what McMichael conceives to be his legal rights in the premises; a protest against any invasion, abridgment or subversion of those rights; and a prayer, that when White's entry is canceled—presumably on the contest then pending, and in accordance with the decision of the local office, recently rendered therein—those rights be recognized and established by the acceptance of his application accompanying said affidavit.

It does not pretend to be an affidavit of contest. Its charges against White's entry are based on the decision of the local office in the contest of Blanchard and Cook against White, then pending. No hearing is asked to prove the charges against White's entry; and no steps were ever taken on that affidavit to secure the cancellation of White's entry. A hearing is asked only in the event that any one, other than McMichael, seeks to enter the land, and then only for the purpose of establishing his prior right by virtue of his settlement on said tract.

From the language of that affidavit it is apparent that McMichael expected that the decision of the local office in the contest then pending would be affirmed, White's entry canceled, and the disqualification of Blanchard and Cook established. When that occurred, he believed his rights, by virtue of his settlement, would entitle him to enter said tract as against all others, and he was content to wait.

Not being an affidavit of contest, nor designed to effect the cancellation of White's entry, it is inconceivable how it could confer any rights on its author that he could assert against one claiming under a subsequent relinquishment.

In the case of *DeMars v. Donahue et al.*, 12 L. D., 113, it is held, in substance, that where an affidavit of contest is filed in the local office, without any intention or purpose of instituting proceedings thereon, it does not confer on the party executing it the status of a contestant, nor secure to him any right that can be asserted against any one claiming under a subsequent relinquishment. That holding is evidently in point here. The affidavit here is not a contest affidavit, it is true. It was filed for the sole purpose of keeping alive McMichael's claim, and giving notice thereof to the world. But he is claiming under it the rights and status of a contestant. In view of its character and the purpose for which it was filed, this he cannot do in the light of the decision referred to above.

Hence Murphy's entry is secure as against the claims of McMichael, based on his alleged settlement and preference right of entry.

The contention that Murphy's entry is void because in violation of Rule 53 of the Rules of Practice, is of no force. In the case of *Hertzog v. Demmer*, 13 L. D., 590, it is held in substance that where a relinquishment is filed during appeal in a contest case, the land is open to the first legal applicant, under the act of May 14, 1880 (21 Stat., 140), and that No. 53 of the Rules of Practice does not apply to such a case, because it is to that effect in conflict with the act of Congress. Therefore, when Murphy presented his application, on White's relinquishment, it was accepted by the local office on the theory that he was the first legal applicant. See also *Hoyt v. Sullivan* (2 L. D., 283).

One of the rules of this Department, established by a number of decisions, is, that a judgment of your office, holding an entry for cancellation, is final so far as that tribunal is concerned, and at once throws the land involved open to entry. That an application to enter made after the date of said judgment and within the time allowed for appeal, should be received, but not placed of record until the time for appeal has expired, or the rights of the entryman on appeal has been determined by this Department. In other words, that such an application shall be received subject to the rights of the entryman on appeal. (*John H. Reed*, 6 L. D., 563; *Henry Gauger*, 10 L. D., 221; *Thomas Rathbun*, 12 L. D., 243; *Perrott v. Connick*, 13 L. D., 598.)

Your office held White's entry for cancellation March 7, 1890. Four days thereafter Holt filed his application to make a soldier's additional homestead entry for said tract. It was received by the local office, but not placed of record, in compliance with the rule above stated. When White's relinquishment was filed on November 29, 1890, that application of Holt's was pending, and should have been placed of record, or the rule enunciated by the authorities above cited is meaningless. It follows, therefore, that the action of the local office in allowing Murphy to make entry of the tract, instead of placing Holt's application of record, was erroneous.

It may be urged that the principle involved in the rule above stated will inure to the benefit of McMichael and give him a prior right by virtue of his application filed with his affidavit of August 31, 1889. But the distinction lies in the fact that the decision of the local office is not final, but is subject to the supervision of your office, and to its approval or disapproval. (Samuel H. Vandervoort, 7 L. D., 86; Dudgeon v. Seeley, 3 L. D., 567; Morrison v. McKissick, 5 L. D., 245, 247.)

Your office decision of January 18, 1893, between McMichael and Murphy is affirmed. That of September 11, 1891, rejecting Holt's application, is modified in this: That inasmuch as Murphy's entry is of record, he will be allowed thirty days from date of notice of this decision to show cause why his entry should not be canceled, and Holt's application placed of record.

CONTEST—PREFERENCE RIGHT—RULES 54 AND 55 OF PRACTICE.

SPRINGER v. GLEESON.

A contest prosecuted to a successful issue, wherein the contestant pays the costs of the proceedings, as provided in Rule 55 of Practice, confers upon the contestant a preference right of entry; but in a suit wherein the costs are apportioned under Rule 54, the contestant has only the right of entry in common with others.

Secretary Smith to the Commissioner of the General Land Office, February 25, 1895. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of Sec. 6, T. 104, R. 70 W., Chamberlain land district, South Dakota, and is before the Department upon motion for re-review by John Gleeson, of departmental decisions of July 7, 1893, and March 7, 1894, reversing the decision of your office, and holding for cancellation his homestead entry.

There is but one question presented by the record that deserves consideration, and that is, as the contest in this case, filed by Herman Springer, was brought under Rule 55 of Practice, and not 54, the contestant has no such status here, as removes this case from that class of cases arising between the United States government and the entryman.

It is contended that, inasmuch as the contestant refused to pay the cost of contest, that this proceeding is in reality an *ex-parte* one, and owing to the alleged hardship of the decision of this Department upon the entryman, that the decisions heretofore rendered should be revoked and set aside, and the entry of Gleeson reinstated.

Rule 54 of Practice provides: "Parties contesting pre-emption, homestead or timber culture entries, and claiming preference rights of entry under the second section of the act of May 14, 1880, (21 Stat., 140), must pay the cost of contest," and Rule 55 is: "In other contested cases each party must pay the cost of taking testimony upon his own direct and cross-examination."

It will be seen, therefore, that under Rule 55, the contestant has no "preference" right of entry, but he has all of the rights of a protestant; where the entry is cancelled, he has the right, as any other citizen, of making entry for the tract, and the only difference between a contest filed under Rule 55 and Rule 54 is that in the former case he has a preference right of entry for a period of thirty days, while under Rule 54 he has the right of entry in common with others.

It is not denied that the former decisions of this Department are supported by the evidence.

The record shows that since the decision of this Department upon review Herman Springer has made entry of the tract and one Annie M. Nichols has made an application to enter said tract; Kittie Gleeson has made application to contest the entry of Springer and Herman Springer has relinquished his entry.

As the record shows that your office has not acted upon these several matters, the papers are returned to you for such action as may be deemed proper by you.

For the reasons stated the decisions sought to be reviewed are adhered to.

RIGHT OF WAY—ACT OF MARCH 3, 1891.

SOUTH PLATTE CANAL AND RESERVOIR CO.

The act of March 3, 1891, restricts the purpose for which the right of way therein granted may be used to that of irrigation; and maps of location will not be approved where it appears that the right of way is desired for any other purpose than irrigation.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (J. I. H.) (F. W. C.)

I am in receipt of your office letter of January 22, 1895, submitting for approval of this Department the maps of location, together with articles of incorporation and other papers filed by the South Platte Canal and Reservoir company as an application for a reservoir and pipe line right of way under the act of March 3, 1891 (26 Stat., 1095).

The maps in form appear to be satisfactory, but in your letter submitting the same you call attention to the powers of this corporation as set forth in its articles of incorporation which are:

To construct, maintain, operate and enlarge, purchase, receive, hold, sell, grant and convey reservoirs, canals, tunnels, pipe lines, water pipes and water mains, for the purpose of conveying water to be used for irrigating, domestic, sanitary, fire, mining, manufacturing and mechanical purposes, and all rights, privileges and franchises belonging to or to be acquired by the same; to appropriate water, water rights, franchises and privileges; to sell and otherwise dispose of water and the right to the use of water for the purposes aforesaid; to construct, maintain, enlarge, purchase, receive, hold, sell, grant, and convey all necessary or convenient lateral ditches, tunnels and pipe lines; to sink wells, cribs and underground galleries for collecting water; to acquire rights of way for its reservoirs, ditches, canals, pipe lines, tunnels, water mains, water pipes, laterals, cribs and galleries; to furnish and sell water to water works companies and to irrigating companies; to sell and supply the city of Denver and additions thereto, and towns and cities in the vicinity thereof, and the inhabitants thereof and others in the vicinity, and all municipalities and the inhabitants thereof, and all corporations and individuals along the line of its canals, ditches, pipe lines, water mains and water pipes with water for the purposes aforesaid, etc.

In this connection you call attention to the decision of this Department in the case of *H. H. Sinclair* (18 L. D., 573), wherein it was held that "The grant made by this act restricts the use of the land over which the right of way is granted to purposes of irrigation," and in that connection your letter states:

There can be no object for such a restricted interpretation of the law when it is considered that, under Sec. 2339, R. S., it is possible for companies to acquire right of way of an extent not specified, yet probably equal in extent with that granted by the act of 1891, for 'mining, agricultural, manufacturing or other purposes' and without direct supervision or control by the department. Another reason for not applying this strict interpretation is that the question whether the right of way is used in accordance with the provisions of the act is a question of fact for determination of the courts, and one which can not be defined or controlled effectively by regulation of the department.

The practice of this office in examining applications on this point has been, to ascertain whether the company was empowered to engage in irrigation, if so, it was presumed that they were entitled to the benefits of the act for the purposes therein specified. The case of *Sinclair et al.* was one where the applicants' objects were confined to the generation of power and did not include the intent to engage in irrigation.

The decision does not clearly apply the ruling to such cases as the present, and these matters are submitted that the extent of its application may be defined.

Since the receipt of said letter from your office you have forwarded a letter filed by the resident attorney for said company in which it refers to your letter submitting the company's maps and therein it is stated:

But regardless of how the act in question should be construed, the company insists that it is an *irrigation* enterprise and calls attention to the fact that the main feature of its certificate of incorporation is *irrigation*. The company further states that the *main* purpose of building this reservoir is to store a large quantity of water for *irrigation* purposes, and incidentally, during part of the year, to let it act as a safety supply of water for Denver. It is not likely that one year out of ten there would be

a demand made upon this reservoir for the supply of the city of Denver; and yet, if that tenth year should be exceedingly dry, and the stream from which the city derives its present supply should be exhausted, the company would want to use the water stored in the reservoir to supply the deficiency.

The eighteenth section of the act of March 3, 1891, *supra*, under which the present application for right of way is filed, provides:

That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company *formed for the purpose of irrigation* and duly organized under the laws of any state or territory, etc.

The whole purpose and scope of this section and the 19th, 20th and 21st following upon the same subject, restricts the grant therein made to the one purpose desired to be aided by the legislation, namely, the subject of irrigation, and in order to secure the approval of this Department to the map of location of any ditch or canal or reservoir filed under this act, it must appear that the *sole* purpose for which the same is desired is that of irrigating the arid lands.

While the articles of incorporation filed empower the company to engage in other business than that of irrigation, yet from the articles themselves it can not be held that the purpose for which the desired right of way is applied is other than that provided for in the statute, namely, irrigation, as under its articles of incorporation it was empowered to engage in the business of irrigation; but the letter from the attorney filed in support of the company's application clearly states that the purpose for which the reservoir and pipe line is desired to be used is for furnishing water in cases of emergency to the city of Denver, although it is stated that the chief purpose for which the reservoir is to be built is to store a large quantity of water for irrigating purposes.

The reference made in your letter, and also in that from the attorney, to section 2339 Revised Statutes, which grants the right of way for mining, agricultural, manufacturing and other purposes has no bearing upon the question now under consideration, namely, the scope and purpose of the act of March 3, 1891. Whatever rights may be granted by said section, suffice it to say, the present application is not made for the purpose of claiming the benefits of said section but rather for the purpose of securing the approval of this Department to its maps of location filed under the act of 1891.

As before stated, said act of March 3, 1891, restricts the purpose for which the right of way therein granted may be used to that of irrigation and where it appears to this Department that the right of way applied for is desired to be used for other than the purpose of irrigation, the same will be sufficient cause for the refusal to approve the maps of location filed.

I therefore herewith return the maps accompanying papers and have to direct that said company be called upon to file its certificate under the signature of its president and the seal of the company to the effect that the proposed reservoir and pipe line on account of which the right

of way is claimed in its application under consideration, is desired for the sole purpose of irrigation. In future a similar certificate should be required of those companies filing maps claiming the right of way under said section, where, under its articles of incorporation, it is empowered to make other use of the water desired to be stored in its reservoir applied for, or conducted by its ditches, than that of irrigation.

INDIAN LANDS—DESCENT OF ALLOTTED LANDS.

PUYALLUP ALLOTMENTS.

The allotment of Puyallup lands, and the consequent investiture of the Indians with the rights of citizenship, do not remove said lands from the control of the President, for the purpose of securing permanent homes to said Indians, and it therefore follows that in ascertaining who are the heirs of deceased Puyallup allottees the President may properly prescribe rules for the descent of said lands, and direct that the order provided by the laws of the State of Washington for the descent of real property shall be applicable to said lands; but under said rules the rights of white men, not members of the tribe, who have married Puyallup women, cannot be considered.

Assistant Attorney General Hall to the Secretary of the Interior, January 25, 1895. (J. I. P.)

On December 21, 1891, the Commissioner of Indian Affairs, by his letter of that date, transmitted to this Department a communication from James J. Anderson, Chairman of the Puyallup Indian Commission, addressed to said Commissioner, December 3, 1894, asking for instructions on certain matters relating to the duties of said commission.

The letter of the Commissioner, with that of Mr. Anderson enclosed, was referred to me on January 5, 1895, by the then Acting Secretary of the Interior, for an opinion on the questions therein presented.

The act of March 3, 1893, (27 Stat., 633), creating the Puyallup Indian Commission, requires it to ascertain "who are the true owners of the allotted (Puyallup) lands."

In order to ascertain that fact, Mr. Anderson desires to know:

1. What rules are to be applied to the descent of Indian lands where the original allottees or some of them have died.

Under instructions approved by the Department November 14, 1893, said commission was directed that in the case of deceased allottees their heirs were to be determined according to the laws of the State of Washington. But Mr. Anderson says that the application of the laws of descent of the State of Washington in such cases would frequently find the title in the members of other tribes or in white persons, and cites several instances in point. In a letter of considerable length and presenting several suggestions worthy of consideration, he concludes that the laws of descent of the State of Washington have no bearing

on these lands. He suggests that said law cannot apply to these lands, for the reason that it only applies to lands held in "fee simple or for the life of another" (section 1480, General Statutes, State of Washington) and he adds, that these Indians certainly do not hold their lands either in fee simple or for the life of another.

I do not deem a discussion of the nature of the allottee's title necessary for the purpose of this inquiry. The allotments are granted to the person or persons named in the patent, and their "heirs," subject to the condition against alienating or leasing for more than two years. It is evident that the interest or estate of the allottee, whatever its nature, will on his death descend to his "heirs," subject to the same conditions and limitations, by which he held it. Hence some rule of descent must prevail. And I am unable to see why the *order* of the descent of "real property" prescribed by the laws of the State of Washington might not, as a matter of convenience, be applied to these allotments on the death of an allottee, regardless of whether the interest of the heir in said allotment constituted "real property" or not under said law.

To illustrate: The general allotment act of February 8, 1887 (24 Stat., 388), provides for the issuance of patents to Indian allottees and provides also that these patents shall recite that the lands patented are held in trust for the allottee by the government for twenty-five years, during which time he may not alienate his land in any way, and any contract with reference thereto is declared to be void. At the end of the trust period a patent conveying the fee will be given the Indian. During the trust period the allottee certainly does not hold his land either in fee simple nor for the life of another. Yet that act provides that if an allottee die, his rights shall descend to his heirs according to the laws of the State or Territory where the land lies, and that the laws of descent and partition of said State or Territory shall apply thereto. If an allottee under that act living in the State of Washington were to die, the laws of descent of that State could not be invoked on behalf of his heirs, if the suggestion of Mr. Anderson be sound, for the reason that the allottee did not hold his allotment in fee simple or for the life of another. And the fact that Congress has prescribed the rule in his case would not bring his title within the purview of the State law, any more than is that of the Puyallup allottee. Hence I am of the opinion that the mere fact that the State law does not apply to the title, has nothing to do with the question, and does not prevent the government from adopting the "order" prescribed by said law in determining the descent of these lands. Their instructions do not require these commissioners to go into the State courts in order to determine who are the heirs of these allottees. But, to themselves, apply the rule prescribed in their instructions, and when the "heir" or "true owner" is so ascertained, to obtain his consent to the sale of his allotment, in the manner provided by the act.

A number of other questions and propositions are submitted, to which I do not deem it necessary to here refer, as they all converge toward the question that in my judgment contains the solution of this problem.

Article 6 of the treaty with the Omahas (applicable to the Puyallup treaty, 10 Stat., 1044), provides "that the President may, on the death of the head of the family, prescribe such rules as will insure to the family the possession of said permanent home, and the improvements thereon."

And Mr. Anderson asks if under that provision of the treaty the President may not prescribe rules for the descent of these lands.

In the recent case of *Eels v. Ross* (Vol. 64, No. 4., Fed. Rep., p. 417), decided by the United States Circuit Court of Appeals, the above provision was considered, and it was held that the allotting and patenting of these lands in severalty to these Indians, and their investiture with the rights of citizenship by the act of February 8, 1887 (24 Stat., 388), did not have the effect of revoking the Puyallup reservation, and that under the provisions of the treaty the control of the President over said lands for the purpose of securing permanent homes to the Indians did not end with the issuance of patent. That being true, it follows in my opinion that to that end the President would have the right to prescribe rules for the descent of these lands.

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." (*Wilcox v. Johnson* (13 Peters, 498; and *Woolsey v. Chapman*, 101 U. S., 755.)

The Secretary of the Interior is the officer charged by law with the management and control of Indian matters. (Revised Statutes, Sec. 463.) These allottees are still the "wards of the nation," and the Secretary of the Interior is the officer charged by law with the duties of guardianship." (19 Op., Attorney-General, 165.)

So that, the instructions to these commissioners, approved by the Secretary of the Interior November 14, 1893, directing them to ascertain the heirs of deceased allottees, according to the law of descent of the State of Washington, was in effect a rule of descent prescribed by the President, is absolute and authoritative, and in complete accord with the policy of the government concerning the descent of allotted Indian lands, established long before the patenting of these lands. See acts of June 1, 1872, 17 Stat., 214; August 7, 1882, 22 Stat., 34; March 1, 1883, 22 Stat., 444; March 3, 1885, 23 Stat., 341; and February 8, 1887, 24 Stat., 388.

However, since the act of August 9, 1888 (25 Stat., 392), a white man, not a member of the tribe, marrying a Puyallup woman, can acquire no right by virtue of said marriage, in any allotment, or any tribal property to which said woman may be entitled, and hence such a man would be excluded from the operation of the rule above stated.

I am also of the opinion that a white man who had prior to the act of 1888, *supra*, married a Puyallup woman, and who had not been regularly incorporated as a member of said tribe, could not be regarded as a member of the family under the treaty, because not an Indian, and hence would not come within the purview of any rule of descent prescribed by the President to secure the possession of said home to the family, and I recommend that the rule as above stated shall be modified so as to exclude such men from its operation.

In other words, the manner of determining who are the heirs of a deceased holder "in fee simple or for the life of another," under the laws of the State of Washington, should be pursued in ascertaining who are the heirs of deceased allottees, *with the exceptions*, that white men not members of the tribe, married to Puyallup Indians since August 9, 1888, and white men not incorporated in the tribe, who prior to that date married Puyallup women, be not considered.

Nevertheless, to save any question concerning the title thereto, I am of the opinion that the consent of such men to the sale of the allotments in which their deceased wives may have been interested is advisable.

The Commissioner of Indian Affairs, in his letter of December 21, 1894, passes in detail on all the other questions submitted by Mr. Anderson, as well as suggests some valuable points on the question of the descent of these lands. I am in full accord with the conclusions and suggestions contained in said letter, and upon the points not herein considered, I endorse and approve it, and submit it to you as my decision thereon.

I therefore suggest that the Commissioner of Indian Affairs be directed to prepare instructions in accordance with this opinion, and to transmit the same to said commission for its guidance.

Approved.

HOKE SMITH,

Secretary.

REPAYMENT—PRE-EMPTION FILING FEE.

LOIS G. WILSON.

The filing fee paid on filing a pre-emption declaratory statement may be properly repaid under section 2, act of June 16, 1880, where the entry cannot be confirmed, and the application is in other respects entitled to favorable action.

Secretary Smith to the Secretary of the Treasury, February 28, 1895.
(J. I. H.) (G. B. G.)

On November 19, 1894, the Hon. Samuel Blackwell, Auditor for the Interior Department, submitted for my consideration a statement in relation to the claim of Lois G. Wilson for \$203, allowed by this Department under the second section of the act of June 16, 1880 (21

Stat., 287), on the application of said Wilson, for repayment of fees and purchase money paid on San Francisco, California, pre-emption cash entry No. 16,771 based on declaratory statement No. 22,742.

You submit that while it is not questioned that the applicant is entitled to repayment of the purchase money, amounting to \$200, paid on said pre-emption entry, that there is serious doubt as to her right to repayment of the \$3, filing fee, paid by her January 10, 1887, on said declaratory statement No. 22,742. That said filing was not "erroneously allowed" in the sense to legally or equitably entitle her to repayment of the \$3, under said act of June 16, 1880. That part of section two of said act, applicable, is as follows:

In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt, and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

Under this act it would seem that the repayment of the filing fee was contemplated.

It is true, as suggested, that the United States appear to have interests involved in this case. That the \$3 was received by its officers for services actually rendered in the case. That the money was covered into the Treasury and its equivalent was paid out by the United States to its officers for the services rendered, so that the United States did not retain the money received, and if called upon to repay it, must do so out of the general Treasury.

But the act directs the repayment to persons who have made an entry which has been erroneously allowed and can not be confirmed, "the fees and commissions" as well as the purchase money and excesses paid upon the same.

A declaratory statement is filed with the express purpose of submitting final proof thereon at a later date, and upon said proof being accepted by the local officers, the final entry is allowed thereon.

In this transaction the declaratory statement is merged into the final entry and becomes a part of the proof thereof, and is deemed a part of the legal structure of which the entry is formed, and should it prove illegal, the entry itself would fail.

A strict construction of this statute would, in my judgment, warrant the repayment of the filing fee in this case, and under a liberal construction which the statute (being remedial in character) demands, I have no doubt of it.

RAILROAD GRANT—INDEMNITY—SPECIFICATIONS OF LOSSES.

NEW ORLEANS PACIFIC R. R. Co.

It appearing that the grant to this company is deficient in quantity, and that no danger of duplication of losses exists, the company will be relieved from the requirements of the regulations of August 4, 1885, and the rule announced in the La Bar case, with respect to the designation of bases for previously patented indemnity lands.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (J. I. H.) (F. W. C.)

I am in receipt of your office letter of January 30, 1895, enclosing for consideration of this Department the request filed on behalf of the New Orleans Pacific Railroad company to be relieved of the requirement contained in office circulars of August 4, 1885 (4 L. D., 90), and December 4, 1893, issued in pursuance to the decision of this Department in the case of *Edw. G. La Bar v. Northern Pacific Railroad company* (17 L. D., 406), which relates to the designation of basis for previously patented indemnity lands.

Your office letter sets forth a peculiarity in the matter of the survey of the lands within the limits of the grant for this company resulting from numerous grants of lands by France and Spain to individuals and to a class of entries known as back concessions, which render a designation of the losses, tract for tract with the selected lands, practically impossible.

It is further stated that while there has been no adjustment of the grant to the New Orleans Pacific Railroad company, yet "it is safe, I think, to assume that the grant will be fully one million deficient." This grant is estimated at about three and a quarter million acres and the company has to date received patents for less than one million acres. Its re-arranged indemnity selections pending amount to only 48,557.73 acres.

In the matter of the Hastings and Dakota Railroad grant it was held by this Department in its decision of July 12, 1894 (19 L. D., 30), in referring to the provisions of the circular of August 4, 1885, *supra*, that—

The provision referred to directed that where indemnity selections had been theretofore made, without specification of losses, the companies should be required to designate the deficiencies for which such indemnity is to be applied 'before further selections are allowed.' . . . In my opinion, that rule is not properly applicable in this case. The object in establishing the rule was to prevent the possibility of one basis of loss being used for more than one selection. As this grant is known to be deficient over eight hundred thousand acres, or more than double the whole quantity of land received and receivable by the company, the danger of a duplication of the losses does not exist; and the reason of the rule ceasing, the rule itself does not operate.

The reasoning in that case seems to apply with equal force to the grant now under consideration and upon the report of your office, as

before set forth, showing that this grant can not be more than two-thirds satisfied within its limits, I have to direct that it be excepted from the requirement made in the circulars referred to in the matter of designation of losses as a basis for its selections previously approved. You will advise the company accordingly.

DEPUTY UNITED STATES MINERAL SURVEYOR.

CHARLES W. HELMICK.

It is not an essential requisite to the appointment of a deputy mineral surveyor that he should be an actual resident of the land district for which he is commissioned; nor is there any statutory reason why such officer should not hold at the same time commissions in more than one State or land district.

Secretary Smith to the Commissioner of the General Land Office, February 23, 1895. (J. I. H.) (V. B.)

In 1894 Mr. Charles W. Helmick applied for a commission as deputy mineral surveyor for Idaho, he being at the time of the application a duly appointed deputy mineral surveyor for Montana and a resident of that State. Your office denied his application, and Mr. Helmick appealed to this Department, which, on June 30, 1894 (18 L. D., 601), approved your action. A motion for review and reversal of departmental decision is now before me.

The law relating to the appointment of deputy mineral surveyors is found in Section 2334, Revised Statutes, and is as follows:

The surveyor general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey.

Construing said section, the decision referred to held that when a deputy mineral surveyor is appointed he should be commissioned as "a resident of a particular land district in his state or territory;" that he is inhibited from going outside that state or territory to survey mining claims; and that he cannot—

hold commissions simultaneously in two or more states, for by the terms of the law he must, as already indicated, be a resident of the state or land district in which he holds his appointment, and a person cannot have two places of residence at the same time.

A further consideration of the subject and of the provisions of law bearing thereon, satisfies me that said departmental decision is erroneous in some respects, and so far ought to be revoked.

The statute does not in terms require that the deputy mineral surveyor should be either a legal or actual resident of the district for which

he may be commissioned. Nor do I see that the nature of his employment, the work that he is commissioned to do, necessarily makes such residence an essential requisite. The work of a surveyor is of a scientific character, and can be performed as well by a competent person who is a non-resident as by one who is an actual resident of the district. Indeed, the desirability of having the work performed with the most absolute mathematical accuracy is a sufficient reason why the selection of competent persons should not be restricted by territorial limitations.

Entertaining these views, I must hold that actual residence within that particular land district is not an essential requisite to the commissioning of a deputy mineral surveyor to do the work therein. And for the same reasons I see no objection to a party holding at the same time commissions as deputy mineral surveyor in more than one State or land district.

The departmental decision of June 30, 1894, so far as it conflicts herewith, is revoked and reversed.

RIGHT OF WAY—ACT OF JANUARY 21, 1895.

INSTRUCTIONS.

The permission to use public lands under the act of January 21, 1895, terminates with a disposal of said lands; and any person, receiving title from the United States to land so occupied, will take it free from any charge thereon by reason of the right granted under said act.

*Secretary of the Interior to the Commissioner of the General Land Office,
March 8, 1895. (F. W. C.)*

I am in receipt of your office letter of February 21, 1895, submitting for my approval draft of proposed regulations to be issued under the act of Congress approved January 21, 1895, entitled "An act to permit the use of the right of way through the public lands for tram roads, canals and reservoirs and for other purposes."

Said act provides—

That the Secretary be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tram roads, canals or reservoirs by any citizen or association of citizens of the United States engaged in the business of mining or quarrying or cutting timber and manufacturing lumber.

You call attention to the fifth paragraph of the regulations, which reads as follows:

5. If the application is satisfactory to the Department, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case. And it is to be expressly understood in every case, that the permission extends only to the public lands of the United States, not within the limits of any park, forest, military or Indian reservation; that it is at any time subject to modification or revocation; that the disposal by the United States of any

tract crossed by the permitted right of way, is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract; and that the permission is subject to any further regulations of the Department.

From a careful review of the matter, I am of the opinion that the regulations are warranted, for my construction of the law is that by said act the Secretary of the Interior is merely to authorize and grant permission to build the tram roads, canals or reservoirs upon the public land which is merely an authority to do an act which without authority would have been unlawful, but which in itself does not constitute an easement in the land.

Without this act it would have been unlawful for persons engaged in the occupations named to have built a tram way, canal, or reservoir across the public land, and in many instances the success of an enterprise would have been greatly impaired or destroyed without such permission.

Under these regulations the permission to use the public lands in the manner stated will terminate with a disposal of the same, and any person receiving title from the United States to any land so occupied, will take it free from any charge upon the land by reason of the granting of any permission under this act.

REGULATIONS CONCERNING PERMISSION TO USE RIGHT OF WAY OVER
THE PUBLIC LANDS FOR TRAMROADS, CANALS AND RESERVOIRS.

REGULATIONS.

The following regulations are promulgated under the Act of Congress of January 21, 1895, (Public No. 25), entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals and reservoirs, and for other purposes," which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or cutting timber and manufacturing lumber."

1. It is to be specially noted that this act differs from the other right of way acts of March 3, 1875, and March 3, 1891, in that it authorizes merely a permission instead of making a grant, and that it gives no

right whatever to take from the public lands adjacent to the line of tramroad, canal or reservoir, any material, earth, or stone, for construction or for any other purpose.

2. The application for permission to use the right of way through the public lands must be filed, and permission granted, as herein provided, before any rights can be claimed under the act, and should be made in the form of a map and field notes in duplicate of the tramroad, canal or reservoir, filed in the local land office for the district in which the right of way is located; if situated in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others.

3. The maps, field notes, evidence of water rights, etc., and, when the applicant is a corporation, the articles of incorporation and proofs of organization, must be prepared and filed in accordance with the regulations for railroad, and for irrigation canals and reservoirs under the general right of way acts, as in the circulars of March 21, 1892, and February 20, 1894, respectively. Forms 4 and 6 being modified in the last sentences to relate to the act of 1895.

4. An affidavit that the applicant is a citizen must accompany the application; if the applicant is an association of citizens, each must make affidavit of citizenship; a corporation organized under the laws of the United States or of any State or Territory will be presumed to be an association of citizens within the meaning of the act. If not a natural born citizen, the applicant will be required to file proofs of naturalization. The applicant must also state in the affidavit the purposes for which the right of way is to be used, whether for mining or quarrying, or cutting timber and manufacturing lumber.

5. If the application is satisfactory to the Department, the Secretary of the Interior will give the required permission in such form as may be deemed proper, according to the features of each case. And it is to be expressly understood in every case, that the permission extends only to the public lands of the United States, not within the limits of any park, forest, military or Indian reservation; that it is at any time subject to modification or revocation; that the disposal by the United States of any tract crossed by the permitted right of way, is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract; and that the permission is subject to any future regulations of the Department.

6. The applicant should mark each of the subdivisions affected by the proposed right of way "V" or vacant, if it belongs to the public domain at the time of filing the map in the local land office, and the same must be verified by the certificate of the register. If it does not affirmatively appear that some portion of the public land is affected, the local officers will refuse to receive the application.

7. When the maps are filed, the local officers will note in pencil on tract books opposite each traversed tract, that *permission* to use the

right of way for a tramroad, canal or reservoir is pending, giving date of filing and name of applicant, noting on each map the date of filing.

8. When the permission is given by the Secretary of the Interior, a copy of the original map will be sent to the local officers, who will mark upon the township plats the line of the tramroad, canal or reservoir, and will note in pencil opposite each tract of public land affected that *permission* has been granted giving the date.

9. Permission may be given under the act for rights of way on unsurveyed land; maps to be prepared as in the circulars noted.

EDW. A. BOWERS,
Acting Commissioner.

Approved:
HOKE SMITH,
Secretary.

MARCH 8, 1895.

INDIAN LANDS—ALLOTMENT—MEMBERSHIP IN INDIAN TRIBE.

JULIA COX.

The right to receive an allotment under the act of February 8, 1887, as defined in the departmental regulations authorized by section 3, thereof, requires the applicant to be a recognized member of an Indian tribe, or that the father or mother of the applicant should have been so recognized.

Assistant Attorney-General Hall to the Secretary of the Interior, March 2, 1895. (J. I. P.)

On August 1, 1894, there was referred to me by the then Acting Secretary of the Interior, for an opinion on the questions therein presented, a communication from the Commissioner of Indian Affairs, dated January 9, 1894, with other papers, relating to the claim of Mrs. Julia Cox for an allotment of lands in the Nez Perce reservation, Idaho, and I herewith submit the result of my investigation.

The claim of Mrs. Cox is based on her allegation that she is descended from Alle-a-Milla Tocking, a full blooded Nez Perce chief; that her father was Arkencher, the son of Alle-a-Milla Tocking by a Columbia River woman, and that he was a half brother to Aposohite, who succeeded his father as chief.

It appears that Mrs. Cox and her husband (a white man) appeared on the reservation after the passage of the general allotment act of 1887 (24 Stat., 388), and located on 640 acres of the richest lands in the reservation, claiming it on the grounds above stated, for herself and seven children.

When Special Agent Fletcher went to the reservation in 1889 to make allotments, Mrs. Cox presented her application for an allotment, and was informed by said agent that she must first prove her relationship to the tribe or be adopted by them, and was also warned not to make

any improvements on the tract she was occupying, as it might result in total loss.

She sought adoption by the tribe, and after a fair and open presentation of her case to the assembled Indians, under the supervision of Special Agent Fletcher, she was emphatically rejected by a vote that was practically unanimous. After her rejection by the tribe, she built a house on the tract she was occupying and insisted that the tribe would adopt her if she was given another chance. Special Agent Fletcher was directed to give her another chance to present her application for adoption, if a full council of the tribe could be had, but she declined to agree to that condition.

Her claim to relationship has been investigated by Special Agents Fletcher, Parker and Lane. The first two reported adversely to her, and on the strength of their report and the information of the Indian Agent (which afterwards proved to be erroneous) that the Coxes had left the reservation, the Indian Bureau, by letter of May 28, 1892, declined the request of her attorneys to re-open the case.

Her attorneys having appealed, the papers in the case were transmitted here June 11, 1892. By direction of this Department, said papers were, on October 20, 1893, forwarded to Special Agent Lane for a careful and thorough examination.

In his report, dated December 14, 1893, Agent Lane, by giving the greatest weight and force to the evidence of Mrs. Cox and her relatives (very much of which is hearsay) on the theory that they are the most likely to be informed on the subject, holds that her pedigree is as she alleges; that she is part Nez Perce and entitled to an allotment on the reservation.

Unquestionably, after her rejection by the tribe, the burden was on her to prove by a fair and clear preponderance of the evidence her pedigree as alleged. The evidence before me goes almost entirely to that point, and is distressingly conflicting, an abstract of which accompanied this opinion. Chief Joseph said, "She has no Nez Perce blood. Her mother was a Dalles Indian, who had two children, sons, it is said, by a Nez Perce, who was a brother to Looking Glass. After the death of her Nez Perce husband, she had a child by a Dalles Indian, and this child was Mrs. Cox." This story was assented to by many present. That the first husband of the mother of Mrs. Cox was a Nez Perce Indian may account for the fact that several Nez Perce Indians claimed to be related to Mrs. Cox, although she is the daughter of a second marriage. In this way the testimony of some of the witnesses of Mrs. Cox, who stated that their parents told them that Mrs. Cox was related to them, may be explained consistent with the idea that really Mrs. Cox is not a Nez Perce Indian by blood.

While the matter is not free from difficulty, still I am of the opinion, after a careful consideration of it, that the evidence fails to show by a fair and clear preponderance, that the father of Mrs. Cox was a Nez

Perce Indian. If it be true however, that Arkencher was her father, and that he was of Nez Perce blood, it is shown, I think, that he, at best, was but a half blood Nez Perce, and never resided with that tribe on its reservation; that he was in the employ of some French and Hudson Bay traders, and that he lived and died at Wen-wah-wee, in the Deschutttes country, which was never a part of the Nez Perce reservation.

There is no evidence going to show that Arkencher ever claimed to be a member of the Nez Perce tribe, or regarded himself as such. He lived apart from said tribe, maintained no tribal relations with it, or ever attempted to identify himself with that people. He died when Mrs. Cox was sixteen years of age, which was about the year 1851. Mrs. Cox, who was born off the reservation, never asserted any relationship to said tribe, or sought adoption thereby for over thirty-five years, or until the act of 1887, *supra*, providing for the allotment of tribal lands, when she located on the reservation, as stated.

Under section 3 of the act of 1887, *supra*, allotments are to be made by special agents, under such rules and regulations as the Secretary of the Interior may prescribe. Those regulations, having the force and effect of law, require in substance that to be entitled to an allotment, the applicant must be a recognized member of the tribe, or his father or mother must be, or have been, such recognized member.

It is clear to my mind, from all the facts presented, that Arkencher was never a recognized member of the Nez Perce tribe, nor identified with that people. I am further confirmed in that opinion from the fact that he was not known to any of the Nez Perce, so far as is shown, at the time Mrs. Cox presented her claim. If I am correct in my conclusions, Mrs. Cox can claim no relationship to the tribe, and her claim to an allotment must be rejected.

I advise you, therefore, that the Commissioner of Indian Affairs be directed, in view of this opinion, to take such steps as may be necessary to remove Mrs. Cox, her husband and children, from said reservation, if they have not already removed therefrom, to the end that the land claimed and heretofore occupied by them may be allotted to those Indians justly entitled to it.

Approved,

HOKE SMITH,

Secretary.

STATE SELECTIONS—ACT OF JULY 3, 1890.

STATE OF IDAHO.

The provision in section 4, act of July 3, 1890, requiring indemnity selections to be made "in legal subdivisions of not less than one quarter section," contemplates selections in as nearly a compact body as possible, limiting the minimum amount that may be taken in any one place to a quarter section.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1895. (F. W. C.)

I have considered the appeal filed on behalf of the State of Idaho, from your office decision of January 11, 1894, holding for cancellation its list of selections, No. 1, as to certain tracts, filed September 3, 1891, under the provisions of section six of the act of Congress approved July 3, 1890 (26 Stat., 216), which grants fifty sections of unappropriated public land "to be selected and located in legal subdivisions as provided in section four" of this act, for the purpose of erecting public buildings at the capital of said State for legislative and judicial purposes.

By the fourth section of said act, which provides for the selection of indemnity school lands, the right is granted to select other lands equivalent to those lost "in legal subdivisions of not less than one-quarter section."

In said list the State makes selection of about six thousand acres, all in township 11 south, range 18 east.

A few of the tracts selected, however, are of less than a full quarter-section, but such tracts when considered in connection with the other tracts embraced in the list, show that the selections taken as a whole, are made of compact bodies in no case less than one hundred and sixty acres, that is, each tract of less than one hundred and sixty acres selected is contiguous to some other tract selected in said list which, when considered together, make a compact body, as before stated, of more than one hundred and sixty acres.

Your office decision holds for cancellation the said list as to the tracts comprising in themselves less than a quarter section, basing the action upon departmental decision of December 19, 1893, 17 L. D., 575, in the matter of certain selections made by the State of Washington under section twelve of the act of February 22, 1889 (25 Stat., 676).

Said decision merely held that selections made under the provisions of the act then under consideration, which are similar to those now in question, must be made in legal subdivisions of not less than one quarter-section, but the condition as presented in this list was not considered in said decision.

It seems to me that the only purpose of Congress in restricting the selections to tracts of not less than one-quarter-section was to prevent the selection of small tracts of forty acres or less in such a manner as might interfere with the disposition of the surrounding lands.

Its purpose would seem to be to require the State to select its lands in as nearly a compact body as possible, limiting the minimum amount that might be taken in any one place to a quarter-section.

The expression quarter-section as here used could not have been intended in a technical sense as restricting the selections to technical quarter sections, but rather to use it in its broader sense as construed in other legislation, as limiting the amount, that is, to one hundred and sixty acres. This would seem to be a reasonable construction of the act and as the selection list under consideration is comprised of only tracts in bodies of not less than one hundred and sixty acres, that is, there are no disconnected tracts within said list comprising less than one hundred and sixty acres, I am of the opinion that the list meets the requirement of the statute and your office decision holding for cancellation certain of the tracts embraced in said list is accordingly reversed and said list is herewith returned with directions that a list in proper form, embracing these tracts, be submitted for my approval, if the list is otherwise regular and free from conflict.

INDIAN LANDS—INDIVIDUAL GRANT—PATENT.

JAMES B. WHITE ET AL.

A reservation of a tract, for the benefit of an individual, provided for in a treaty that extinguishes the Indian title to certain tribal lands, of which said tract is a part, vests a title in such reservee which he may convey; and the transferee in such case is entitled to a patent.

Assistant Attorney General Hall to the Secretary of the Interior, January 29, 1895. (E. W.)

On the 10th of February, 1894, James B. White, O. C. Hill and Wm. Hood, through their attorneys, Dudley and Michener, presented an application to the Commissioner of the General Land Office for a patent for a certain tract of land reserved for Besiah, an Indian, under the second article of the treaty between the United States of America and the Pottawotamie Indians, of the State of Indiana and Michigan Territory, concluded at the Tippécanoe river in the State of Indiana, on the 27th day of October, 1832, the description of which land is as follows: fractional Sec. 36, T. 37, R. 8 W., second meridian, Indiana.

The application sets out that the said applicants are citizens of the United States and are the present owners by transfer to said land. Said application is accompanied by an abstract of title.

Endorsed upon the letter of the Commissioner of Indian Affairs, dated June 19, 1894, to the Secretary of the Interior with reference to the subject-matter of said application, was a request by the Hon. W. H. Sims, First Assistant Secretary, for "an opinion as to whether the title in question vests, and whether the application for a patent should be allowed."

A compliance with said request involves a construction of the second article of the treaty hereinbefore mentioned.

It appears that Besiah, the beneficiary of the reservation in question, on March 3, 1837, conveyed, by deed of warranty, said land to other parties, the consideration expressed being \$1600. Subsequent conveyances, as appears by an inspection of the abstract of title accompanying the application, fixes the title in the present applicants for patent.

There are certain reservations made both in the second and in the third articles of the treaty under consideration. In the second article only two individuals are mentioned, Besiah and Ocachee. The other reservations mentioned in said second article are for bands or groups of individuals. In the third article all of the reservations mentioned are for individual beneficiaries.

The first article of said treaty reads as follows:

The chiefs and warriors aforesaid cede to the United States their title and interest to lands in the States of Indiana and Illinois and in the Territory of Michigan, south of Grande river.

In the second article the reservations are made in the following language, to wit:—"From said cession aforesaid the following reservations are made, to wit,"

then follows reservations for various bands and for the two individuals hereinbefore mentioned.

In the third article the following language is used:—

The United States agrees to grant to each of the following persons the quantity of land annexed to their names, which land shall be conveyed to them by patent;

then follows the names of seventy-two individuals to whom the reservations are made, after which the article ends with the following language:

The foregoing reservations shall be selected under the direction of the President of the United States after the lands shall have been surveyed and the boundaries to correspond with the public surveys.

The contention of the applicants is that the reservations made for the benefit of the two individuals mentioned in the second article, are to be disposed of in the same manner as the reservations mentioned in the third article and that it was the intention of the parties to the treaty that fee simple title should vest in all the individuals alike, both those mentioned in the second, as well as those mentioned in the third article of said treaty.

It can not be questioned that it was the intention of the government to bestow a fee simple title on all persons mentioned in the third article of the treaty under consideration. It was so determined by the supreme court in the case of *Doe v. Wilson* (23 How., 461). In said case it is held as follows:

The Pottawotamie nation was the owner of the possessory right of the country ceded, and all the subjects of the nation were joint owners of it. The reserves took by the treaty directly from the nation, the Indian title; and this was the right to occupy, use and enjoy the lands in common with the United States, until partition

was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians as a nation reserved no interest in the Territory ceded; but as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added or promised to be added.

* * * * *

Although the government alone can purchase lands from an Indian nation, it does not follow that when the rights of the nation are extinguished, an individual of the nation who takes as private owner can not sell his interest. The Indian title is property, and alienable, unless the treaty had prohibited its sale. *Comet v. Winton*, 2 Yerger's R. 148. *Blair and Johnson v. Pathkiller's Lessee*, 2 Yerger, 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated as the land ceded was forthwith to be surveyed, sold, and inhabited by a white population, among whom the Indians could not remain.

It is thus very plainly declared by the court, that when the title of the Indian nation is converted into individual property, that the same is alienable, "unless the treaty had prohibited its sale." It is further declared that a sale of the *reserved sections* was contemplated at the time of the treaty. The fact that the reservation of Besiah was provided for in the second article of the treaty, in which no mention is made of the obligation on the part of the United States to convey to him by patent, affords no proper argument against his right to sell, because the right to sell is not prohibited by the treaty.

But no reason is disclosed in the treaty why such a distinction should be made and it seems to me to be more in consonance with the scope and spirit of the treaty to assume that the two individuals O-ca-chiee and Besiah were, by inadvertence mentioned in the second, instead of the third, article.

The United States sustains a relation of *quasi* guardianship towards the Indians, in view of which its treaty stipulations with them ought to be construed with great liberality. Besiah, doubtless, believed that his rights under the treaty were precisely the same as those individuals mentioned in the third article. The facts and circumstances attending the treaty justified that belief, and the stipulations therein in his interest ought to be construed with special reference to such belief.

The policy of the government adopted in 1830 with reference to the Pottawatomie Indians was to secure their removal to some point west of the Mississippi river.

The treaty of 1832 was formulated with special reference to, and adopted as an auxiliary step in, accomplishing the objects of that policy. If it was contemplated in the case of Besiah that he should remove with his tribe west of the Mississippi river, then it must have also been contemplated that he should receive title which he could alienate or convey, otherwise the reservation in his behalf would have been entirely useless to him.

If, on the other hand, it was contemplated in the treaty that there should be an exception in the case of Besiah and that he should be permitted to remain east of the Mississippi river, then that would

involve the idea of a severance of his tribal relations, and the location of the land by the President and the installment of Besiah in the possession of it should be regarded in the same light as if he were dealing with a citizen of the United States. In that event, it seems to me as if the government contemplated vesting a fee simple title in him.

This view is emphasized by the history of Besiah's selection and its approval by the President.

On October 5, 1835, the President approved Besiah's selection, but Besiah objected to the approval because the Commissioner of the Land Office construed it to be conditional. The Secretary of War and the Commissioner of Indian Affairs recommended that the selection be approved unconditionally, and on January 24, 1839, the President gave it his unconditional approval.

The titled bestowed on Besiah by the treaty of 1832, in the light of the construction which I have placed upon it, is in the nature of a grant, and places him in the category of any other beneficiary under a grant from the government.

Taking into view the scope and aim of this treaty, it occurs to me to be a sound conclusion of law that an individual reservation to an Indian must necessarily mean, whether he was to remove or to remain, that the government intended to vest a title in him which he might convey, as all the tribal lands south of the Grand River were thereby disposed of. If he had a right to convey, it follows as a matter of course, that the transferee has a right to a patent.

The unconditional approval of the President in 1839, justifies the conclusion that his right so to remain was recognized by the government. This carries with it also, as a necessary inference, the idea of a severance of his tribal relations.

While it is doubtless true that the title of Besiah is complete without patent, still the patent is desirable and important as "an invaluable muniment of title and a source of quiet and peace to its possessor."

In the case of *Wright v. Roseberry* (121 U. S., 488), the court says:

In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title or of such equities respecting the claims as justify its recognition and confirmation.

The doctrine which is thus expounded seems to me to justify the inference that it is the right of a citizen to have patent issue as a just recognition of a previously existing title from the government.

I am of the opinion that this case comes within the spirit, if not the letter, of section 2448, Revised Statutes, and that patent should issue in conformity to its provisions.

Approved,

HOKE SMITH,

Secretary.

RAILROAD GRANT—PLACE LIMITS—INDEMNITY.

OREGON AND CALIFORNIA R. R. CO. *v.* GRAY.

The mere "listing" of a tract as within the primary limits of a railroad grant does not operate to reserve it from other appropriation; and where a tract, so listed, is subsequently found to be within the indemnity limits of the grant, no rights thereto on behalf of the company can be recognized prior to the selection thereof.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1895. (G. B. G.)

The land in controversy is the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 1, T. 4 N., R. 2 W., Oregon City land district, Oregon.

It is claimed by the Oregon and California Railroad Company, under an application to select as indemnity, under the act of May 4, 1870, (16 Stat., 94), to aid in the construction of a railroad from Portland to Astoria, in the State of Oregon, and from a suitable point of junction near Forest Grove, to the Yamhill River, McMinville.

The claim of the defendant, Celia E. Gray, is based on her pre-emption filing for the tract on February 10, 1887.

By the act of May 4, 1870, *supra*, there was granted to the Oregon Central Railroad Company each alternate section of the public lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof not otherwise disposed of, or reserved, or held by valid pre-emption or homestead right, at the time of the passage of said act. In case the quantity of ten full sections per mile could not be found on each side of said road, within the limits of twenty miles, it was directed by said act that other lands, as hereinbefore designated, should be selected under the direction of the Secretary of the Interior, on either side of any part of said road nearest to, and not more than twenty-five miles from the track of said road, to make up any such deficiency.

It appears from your office decision herein, that the road was completed from Portland *via* Forest Grove to McMinville, and by the act of January 31, 1885, (23 Stat., 296) the grant was declared forfeited, as to the lands opposite the unconstructed portion of said road.

Said forfeiture act declared That so much of the lands as are adjacent to, and coterminous with, the uncompleted portions of said road be, and the same are hereby declared to be forfeited to the United States, and restored to the public domain, and made subject to disposal under the general land laws of the United States, as though said grant had never been made.

It further appears from your office opinion, that the tract in question fell within the primary or granted limits, prior to the forfeiture, but after the passage of the act of January 31, 1885, *supra*, it became necessary to establish new limits upon the portion saved from forfeiture, and that this tract is within the indemnity limits upon this adjustment.

The opinion appealed from holds that the aforesaid tract of land "was never withdrawn for indemnity purposes, and hence it is merely necessary to consider the status of the land at the date of the company's selection, September 19, 1885." And in conclusion holds that said land was not subject to selection at that date, for the reason that one Hayburn had at that time a pre-emption filing on the land, and that it was in the possession and occupation of the defendant, Gray, at that date.

On appeal, the railroad company complains of your office decision as follows:

1st. That it was error to find and hold that said Hayburn's filing was an appropriation of the land, or had any effect upon the company's right under its grant.

2d. The Commissioner erred in awarding the land to Celia E. Gray.

3d. The Commissioner erred in not sustaining the right of the company to said land under its grant.

Stripped of all extraneous matter, the question is one of law. Did the filing of Hayburn, and the settlement of Gray, at the date of the selection by the railroad company, reserve the land from such appropriation?

The material facts are not in dispute.

It appears that Joseph Hayburn filed his declaratory statement, No. 4887, for the NE. $\frac{1}{4}$ of said section, August 17, 1885, alleging settlement thereon July 10, 1885. This filing was cancelled February 16, 1886, as to the N. $\frac{1}{2}$ of said NE. $\frac{1}{4}$, and subsequently, Hayburn perfected claim to the S. $\frac{1}{2}$ of said NE. $\frac{1}{4}$.

By departmental decision of May 9, 1892, (L. and R. 243, p. 440), in the case of Oregon and California Railroad Company v. Joseph Hayburn, the said Hayburn's entry was confirmed, and it was therein held that, "The tract in question being in the possession and occupation of Hayburn on September 19, 1885, was not subject to the company's selection, and the same will accordingly be cancelled."

It appears further, that on January 15, 1886, Celia E. Gray entered the N. $\frac{1}{2}$ of said NE. $\frac{1}{4}$ as a homestead, upon which she made final proof, and certificate issued April 16, 1886. By reason of charges by a special agent that the said Gray had not lived on the land during certain periods, this office held her entry for cancellation, upon which the said Gray executed a relinquishment of said entry, and it was cancelled by your office letter "P", of March 5, 1887.

On February 10, 1887, the said Gray made pre-emption filing for the same tract, and submitted proof in support thereof. The company filed a protest against the allowance of said proof, which was overruled by the local officers, in which ruling your office sustains the ruling of the register and receiver, as aforesaid.

The contention of the railroad company is, that the grant under the act of May 4, 1870, was a grant taking effect from the date of the act. That the said railroad company's listing of said land, per list No. 2, (G. L. O. No. 3) was presented to the register and receiver August 2,

1880, and approved by them, and placed on record in the Oregon City land office December 2, 1880; that said approved list was received at the General Land Office June 27, 1881, and that the same is now on file therein. That it does not appear that any action has been taken adverse thereto, by the Commissioner, and that the said list is duly posted on the records in the General Land Office, and is intact upon the records therein. That the register and receiver duly certified to said list, that the tracts therein described were vacant, and inured under the grant of 1870, and acknowledged the receipt of their fees due thereon, and that this was nearly five years prior to the alleged settlement and filing of Hayburn. That when the company filed said list, the land was within the primary limits of the said grant of 1870.

In consideration of the foregoing premises, it is urged that the listing of the land in controversy was a valid appropriation of the same, that the acceptance of said list by the register and receiver, and the payment of selection fees to them, as required by law, operated as a reservation of the land, and thereby excluded the same from the subsequent application of Hayburn to file a pre-emption claim thereon, and that whether the company's listing of the land was valid or not, it was a bar to any other disposition of the land, while it remained of record uncanceled.

The authorities do not sustain this view of the case.

The error into which counsel for the company has fallen, lies in a failure to distinguish between granted lands, properly so called, and indemnity lands. The title to lands within the granted or place limits attaches as of the date of the granting act, when the lands are located by an approved and accepted survey of the line of the road, filed in the Land Department, while the title to indemnity lands accrues only from the time of their selection. *Barney et al v. Winona and St. Peter Railroad Company* (117 U. S., 228).

That part of the road to which the land in controversy was contiguous, and within whose place limits it fell, was not definitely located, and the mere listing by the railroad company did not pass the title, or reserve it from other appropriations.

"No rights are acquired by the 'selection' of land within granted limits, as the right of the company is determined by the status of the land at the date the grant becomes effective by definite location." *Northern Pacific Railroad Company v. Edward Miller* (11 L. D., 482), and cases cited.

The company therefore acquired no title to the land in controversy, as place land, and although, under the readjustment aforesaid, it fell within the indemnity limits of the completed portion of the road, and was selected by the railroad company as indemnity lands, it was, before such selection, appropriated, and the title did not pass.

The decision appealed from is therefore affirmed.

STRUTZ v. CRABB.

Motion for review of departmental decision of August 18, 1894, 19 L. D., 122, denied by Secretary Smith, March 11, 1895.

PRACTICE—CERTIORARI—APPEAL—RULE 83.

THE CURRENCY MINING CO.

Proceedings by way of certiorari under Rule 83 of Practice, can only be entertained in cases where the Commissioner formally decides that the applicant is not entitled to be heard before the Department on appeal.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1895. (W. F. M.)

On December 7, 1892, the Currency Mining Company, a corporation organized under the laws of the State of Colorado, filed applications in the land office at Pueblo, Colorado, for patents for the Engineer and Amy lode claims, the same being situated in the Cripple Creek Mining district, county of El Paso.

On February 20, 1893, the Mutual Mining and Milling Company, also a Colorado corporation, filed a protest against the issuance of patent, alleging various irregularities and conflicts.

On May 12, 1893, the register and receiver rejected the application as to the Amy lode for the reason "that the ground claimed is other ground than is embraced in the location certificate." On appeal to your office that decision was affirmed on November 2, 1893, but, on review, on December 26, 1893, the last mentioned decision was revoked, that of the register and receiver was reversed, and it was directed by your office letter of that date that the application of the Currency Mining Company be received.

On February 3, 1894, a further motion for review was filed, and the same was denied by office letter "N" of May 23, 1894.

On July 30, 1894, the protestants filed in the local office a petition for an order to issue out of this Department for the certification of the proceedings under practice rules 83 and 84. The prayer of the petition is that a hearing be ordered to determine "the truth of the allegations in the protest."

Practice rule 83, under which this proceeding is brought, is designed to provide a remedy only in cases in which the "Commissioner shall formally decide that a party has no right of appeal to the Secretary." It was never intended that the certiorari should take the place of appeal, or stand as a concurrent remedy. That which can be, or may have been, accomplished by the reasonable exercise of the right of appeal, can not be asserted through certiorari, which is merely supplemental in its nature and functions.

The protestants having failed to prosecute an appeal from the adverse judgment of your office, the present proceeding, resorted to for the purpose of effecting by indirection the objects of an appeal, will not be entertained.

The petition is, therefore, denied.

TIMBER CULTURE CONTEST—RELINQUISHMENT.

ACKELSON *v.* ORR.

The right of a contestant, who establishes the truth of his charge, is not defeated by relinquishment of the entry under attack and the intervening entry of a third party, where the cancellation is the result of the contestant's action.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1895. (J. L.)

In the above entitled case, Ettie E. Orr has appealed from the decision of your office of July 21, 1893, holding for cancellation her timber culture entry, No. 8007, of February 11, 1891, of the SW. $\frac{1}{4}$ of Sec. 25, T. 4 S., R. 33 W., Oberlin land district, Kansas.

On March 19, 1885 one Michael R. Johnson made timber culture entry of said tract.

On April 5, 1886, H. F. Sheets filed his affidavit of contest against said entry.

Said contest was tried May 20, 1886; decided by the local officers in favor of Johnson on April 26, 1887; appealed June 8, 1887; decided by the General Land Office March 23, 1889; and on appeal filed May 17, 1889, the contest was finally decided in favor of Johnson, by this Department, on September 24, 1890.

While said appeal was pending here, and after the end of the fourth year of Johnson's entry, to wit: on April 11, 1889, Sheldon N. Orr filed his affidavit of contest against Johnson's entry. And on December 31, 1889, J. W. Ackelson filed his affidavit of contest against said entry, alleging:

That the said Michael R. Johnson has failed to plant the second five acres of the fourth year, to trees, seeds or cuttings of trees; and also failed to cultivate the first and second five acres the fourth year, or cause the same to be done.

And at the same time he filed therewith an application to make timber culture entry of said tract.

Mr. Sheets submitted to the final decision dismissing his contest, filing no motion for review, and therefore, on January 19, 1890, the local officers notified Sheldon N. Orr that they would issue notice on his contest, upon application and the payment of fees. It does not appear that Ackelson, the third contestant, had any notice whatever.

Sheldon N. Orr did not apply, nor did he pay the fees. But on February 11, 1891, Miss Ettie E. Orr (Sheldon's niece) filed in the local

office Michael R. Johnson's relinquishment to the United States of his entry, and then and there was permitted by the local officers to make timber culture entry of said tract of land.

On March 12, 1891, Ackelson filed a second application to make timber culture entry of said tract. It was rejected by the local officers, for conflict with Miss Ettie E. Orr's entry made in February, the month before. Ackelson appealed. On July 21, 1891, your office reversed the action of the local officers, and directed a hearing within thirty days, at which Miss Ettie E. Orr should be required to show cause why her entry should not be cancelled, and Ackelson should be allowed to introduce testimony to show that Johnson's relinquishment was caused by his (Ackelson's) contest, and not by the contest of Sheldon R. Orr.

After the hearing the local officers recommended that Ackelson's application be dismissed, and that Ettie E. Orr's entry be held intact.

Ackelson appealed. On July 21, 1893, your office modified the decision of the local officers, and held Miss Orr's entry for cancellation,—provided that Ackelson should within thirty days perfect his application to make entry; "otherwise Orr's entry will remain intact."

From said decision Miss Orr has appealed to this Department.

At the hearing, Ackelson proved by the testimony of three disinterested witnesses the truth of the charges against Johnson, contained in his (Ackelson's) affidavit of contest.

Miss Ettie E. Orr, a young woman, living at Colorado Springs, Colorado, dependent on her own labor for support, and working by the month, did not attend in person. She was represented by attorneys, and by her uncle, the aforesaid Sheldon R. Orr, who was the only witness examined in her behalf. His affidavit of contest was not put in evidence, and it is not to be found among the files of the record before me. I do not know what were his charges against Johnson's entry. Miss Orr certainly offered no evidence to prove any charges whatever against Johnson, and showed no cause why her entry should not be cancelled.

Her solitary witness went further, and proved that he abandoned his contest; refused to pay the land office fees; and procured the cancellation of Johnson's entry by purchasing his relinquishment, for a sum of money estimated to be as much as it would cost him to put the contest through. He proved further, that he had exhausted by use all his rights in respect to public lands, and therefore could not have enjoyed a preference right of entry, and had no personal motive to prosecute his contest, which therefore had no terrors for Johnson. He says that his niece furnished the money to pay for the relinquishment, and put her timber culture entry on; that he assisted her, and has acted as her agent ever since.

The result of the testimony is, that the sale of Johnson's relinquishment, and the cancellation of his entry, were procured by Ackelson's contest. He has earned his preference right of entry under section two

of the act of March 14, 1880, (21 Stat., 140). See *Webb v. Loughrey, et al.* (9 L. D., 440).

Whatever right Ettie E. Orr would otherwise have must stand subordinate to Ackelson's preference right under his contest and application of December 31, 1889, to make timber-culture entry.

Your office decision of July 21, 1893, holding her entry for cancellation, provided that Ackelson shall within thirty days from notice perfect his application to make entry, and allowing her entry to remain intact should he fail to exercise his right, is accordingly affirmed.

MILLER v. SEBASTIAN.

Motion for review of departmental decision of October 10, 1894, 19 L. D., 288, denied by Secretary Smith, March 11, 1895.

CONTEST—PRE-EMPTION CLAIM—ACT OF REPEAL.

WILLIAM H. FORMAN.

A contestant who secures the cancellation of an entry prior to the repeal of the pre-emption law, but does not settle on the land until subsequent thereto; has no right that can be protected under the terms of said repeal.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1895. (W. M. B.)

I have considered the appeal from your office decision of March 18 1893, in the case of *ex parte* William H. Forman, wherein is rejected his application to file pre-emption declaratory statement for the SW. $\frac{1}{4}$ of Sec. 27, T. 30 S., R. 32 W., Garden City, Kansas, land district.

The record shows that on March 29, 1889, Forman filed contest against the timber culture entry of M. C. Carpenter for the land in controversy, and succeeded in having said entry canceled on July 29, 1890. Not until March 22, 1892, did Forman present his declaratory statement for filing, alleging settlement the same year, and his application was rejected on the ground that the pre-emption law was repealed (March 3, 1891) prior to the date of making declaration and that of alleged settlement.

From that action of the local office Forman appealed, and upon consideration of that appeal, by decision of your office, rendered June 9, 1892, he was required to show residence upon the tract prior to date of repealing act of March 3, 1891, in order that "under ruling in case of Frederick Meiszner (8 L. D., 227), his declaratory statement would be returned for allowance."

All that Forman did to meet this requirement of your office was to make affidavit dated October 4, 1892,

in which he stated that he had ten acres of land broken, harrowed and drilled to wheat on the land, prior to March 3, 1891, and that he had been caring and looking after the land since that date.

In your office letter it is stated that

in his affidavit (dated March 29, 1892) accompanying his declaratory statement, Forman stated that he had not had notice of the said cancellation, though making weekly trips to the post office and that he had but lately been informed that a neighbor, receiving his mail, had lost it and failed to so report.

Upon the state of facts as above related, your office, on March 18, 1893, finally rejected the declaratory statement of Forman, from which decision Forman appealed to this Department, assigning substantially specifications of error embodying the same facts and questions of law as were considered in your office decision appealed from.

The appellant places much stress upon the averment contained in the second allegation of error, that

it was through no fault of his that his declaratory statement was not filed sooner, because he had never received notice of said cancellation, and thus we claim said decision contrary to the evidence.

There can be no possible controversy over the facts in this case, the sole question being, did Forman—under the plain statement of facts presented by him—comply with the requirements of the pre-emption law.

Forman alleges that when he entered contest against this land it was his intention to claim it as a pre-emptor, yet the records fail to show that he offered to file any declaratory statement or application to enter the tract within a reasonable time after it became subject to entry.

The tract became subject to disposition July 29, 1890, being the date of cancellation of entry of record resulting from Forman's contest. It does not appear that he hesitated for want of notice of cancellation to take possession of and cultivate a part of the land prior to March 3, 1891, upon which he failed, however, to establish residence, until after the passage of that act.

The cultivation, caring for, and looking after the land, as alleged by Forman, can not, in the absence of residence, be considered settlement within the intendment of the pre-emption law, and as forming a sufficient basis upon which to found a valid pre-emption claim, which would be protected under section 4 of the act of March 3, 1891 (26 Stat., 1095).

The judgment of your office, for the foregoing reasons, is therefore affirmed.

PRACTICE—APPEAL—LEGAL HOLIDAY—RESIDENCE.

JOHNSTON *v.* HARRIS.

Where the last day allowed for filing an appeal falls on a legal holiday the appellant has until the next business day within which to file his appeal.

An adverse claimant will not be allowed to take advantage of his own wrongful acts in preventing the entryman from maintaining a continuous residence.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1895. (I. D.)

The land involved in this case is the E. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 12 N., R. 3 W., Salt Lake City land district, Utah.

The protestant appeals from your office decision of April 24, 1893, in which you dismiss Johnston's contest and accept the final proof of Harris.

In this case Harris, the claimant, filed his motion to dismiss the appeal on the ground that it is not filed "within sixty days from the date of the service of notice."

A written acknowledgment of personal service of your decision shows that such service was made May 5, 1893.

The appeal was filed July 5, 1893. Rule of practice 86 provides that an appeal from the Commissioner's decision must be filed in the government land office within sixty days from the date of service of the notice of such decision. In this case the sixty days by calendar expired July 4, 1893, and the local office was closed on that day, it being a legal holiday, and the appeal was filed on the next business day.

The office being properly closed on the sixtieth day the appellant was entitled to file his appeal on the next day. It has been held that: "Failure to appeal because of temporary closing of the local office should not injure the rights of the claimant who appeals after the time therefor has expired," (Jas. Mahood, 2 L. D., 211) and in the case at bar the local office was lawfully closed.

When the last day allowed for the filing of an appeal falls on Sunday, or a legal holiday the appellant properly has until the next business day in which to file.

In this case the appellant may have neglected to file before the expiration of sixty days because of the statute of Utah which provides that the time within which any act of a secular nature is to be computed by excluding the first day and including the last day "unless the last day is a holiday and then that is also excluded."

It appears from the record that Johnston has never made any homestead or pre-emption filing for the land but has some improvements partly on the tract involved, which he uses as an adjunct to a tract of some five thousand acres of public land unlawfully enclosed for grazing, but as the question of his right to appeal as a mere protestant is not urged, the case will be disposed of on its merits.

October 22, 1888, the claimant, Harris, made declaratory statement for this land together with the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the same section, alleging settlement October 3, 1888, and on June 25, 1891, after due notice, he offered final proof but for some reason not appearing in the record, his proof only covered the eighty acres involved.

Wm. Johnston pending said notice of proof and on June 2, 1891, filed a protest against said proof charging a failure on the part of Harris to comply with the law as to residence, improvement, or cultivation; that his entry was for speculative purposes; that protestant had valuable improvements on the land and had discovered and located valuable mineral deposits on the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the land and had expended large sums of money in improving the spring on the tract in controversy as an adjunct to his mineral location.

Hearing was had at intervals from September 21, 1891, to March 28, 1892. The testimony shows that the possession of Johnston was by an unlawful enclosure of over five thousand acres of public land (including the quarter section entered by Harris) and used for grazing purposes and that his possession was as exclusive of the entire five thousand acres as it was of this quarter section, excepting the house with possibly a small enclosure around it which he used in connection with the grazing business of the entire tract, having his home on section five.

There is no evidence showing any cultivation or improvement whatever other than that accessory to the grazing business. No evidence whatever is offered as to Harris' entry being speculative, or as to Johnston having located any mineral on the tract, and the case rests therefore upon the charge that Harris had not complied with the law as to residence, improvement and cultivation.

It appears that from the time of his entry he made the land his home in a house thereon with all necessary housekeeping conveniences, but was back and forth as his work demanded (he being a single man) and would be on the land as much as four months at a time and then away for two or three months, but in 1890 he lived on the land continuously for eleven months. But on December 28, 1890, he left to be absent for New Year's, and on business, for a few days and when he returned the first week in January, 1891, his house had been torn down and the logs scattered some distance from the foundation. It was a log house with plain white pine floor, one window and one door, the window having six panes.

In March, 1891, Harris with his father and two brothers came to rebuild the house and were driven off by Johnston and his family by threats of shooting, Johnston having his gun in his hands.

In April, Harris sent two other men with a team to haul the logs back to the foundation and rebuild his house but they were driven away by the protestant and his family in the same manner.

It does not appear that Harris made any further effort to rebuild

after that, nor to occupy the land. Before that, however, he had plowed ten acres, raised crops on part of it, built some rock wall for a fence, and built some other fence, made a reservoir for irrigating part of the land and had a log house thirteen by sixteen feet, until it was torn down by some one during Harris' temporary absence.

The fact that he had not resided on the land nor rebuilt his house is satisfactorily accounted for and the protestant can not be allowed to take advantage of his own acts in preventing Harris' continued residence on the land.

Your office decision is affirmed; Johnston's protest is dismissed and Harris' final proof accepted.

HOMESTEAD CONTEST—ABANDONMENT—MARRIAGE.

SHAFFER *v.* FOX.

After the expiration of five years from the date of a homestead entry it is not sufficient, in alleging abandonment against the same, to follow the words of the statute, but it should be clearly alleged that the entryman did not earn his claim by compliance with law prior to the expiration of said period.

A single woman who makes a homestead entry, and then marries, loses no rights under the homestead law by her marriage.

Secretary Smith to the Commissioner of the General Land Office, March 11, 1895. (C. W. P.)

I have considered the case of Edward L. Shaffer against Addie L. Fox, formerly Addie L. Vale, upon the appeal of the former from the decision of your office of the 12th of August, 1893. The land involved is the SW. $\frac{1}{4}$ of Section 2, T. 10 S., R. 39 W., Wa Keeney land district, Kansas.

Addie L. Fox made homestead entry for said land September 29, 1885. March 3, 1893, Shaffer offered affidavit of contest, charging that Addie L. Fox, formerly Vale:

Has wholly abandoned said tract; that she has changed her residence therefrom for more than six months since making said entry; that she married one Frank Fox before five years had expired, and went to reside with her said husband on another tract of Government land before her five years residence had expired.

This affidavit of contest was rejected by the register. On appeal to your office, the ruling of the register was sustained, with the modification of allowing Shaffer thirty days to amend his affidavit of contest. No action was taken by Shaffer, and your office dismissed the contest. Shaffer has appealed to the Department.

Your decision is clearly correct. After the expiration of five years from entry, the presumption is that the claimant has complied with the law and the departmental requirements. It is not then sufficient to charge a default in the words of the Revised Statutes (Section 2297), but it should clearly appear that if the charge is true, the claimant had not earned her claim by a compliance with the law within the term

of five years from entry. The allegations contained in this affidavit, do *not* charge that the claimant has abandoned her claim for more than six months *before the expiration of the five years* residence required by law. After the expiration of five years the claimant is no longer required to reside upon her claim.

A single woman who makes a homestead entry and then marries, loses no rights under the homestead law by her marriage. *Hanson v. Earl* (13 L. D., 548); *Jane Mann* (18 L. D., 116).

The decision of your office is therefore affirmed.

AMENDMENT—APPLICATION TO ENLARGE ENTRY.

SHERMAN A. CHIVENS.

The right of amendment can not be recognized on behalf of one who makes an entry, and takes less than he might have taken had he informed himself of the status of the records of the local office.

Secretary Smith to the Commissioner of the General Land Office, March 12, 1895. (E. M. R.)

The record shows that on June 14, 1893, Sherman A. Chivens made homestead entry for the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 30, T. 27 S., R. 3 W., Salt Lake City land district, Utah.

On July 13, 1893, the local officers transmitted his application to amend, which included the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the same section and township, which was rejected by your office on October 19, 1893.

The affidavit of Chivens shows that he lives two hundred miles from the land office of the district, and that it was the custom of the settlers in that vicinity to go to the county clerk of Piute county to make entries of land. That he intended to make entry for the one hundred and twenty acres above described, but the township map in the clerk's office showing that forty acres of the aforesaid tract were covered by the entry of one Reuben De Witt, he was told that he could only make entry for the eighty acres first above described.

There was no mistake made by the appellant in the description of the land he desired to enter. The only mistake shown by the record is that the township plat still showed the land to be covered by the entry of De Witt, when, in fact, such entry had, on May 28, 1892, been amended leaving unappropriated the forty acres now sought to be included within the entry of Chivens.

It does not appear from the papers submitted in the case that the map was a new one nor does it appear that the appellant showed due diligence in making prompt inquiries of the local officers as to the true status of the land; but even if this had been done, it is an undecided question, as far as I have been able to ascertain from the decisions of

the Department, whether the application would have been granted, as such decisions seem to point only to the correction of errors where the true description of the land was not given, and do not seem to justify the belief that an entry can be amended when the description is correct as to the land intended to be entered, even though the entryman desired to make entry for a larger tract.

In Michael Dermody (10 L. D., 419) syllabus, it was held *inter alia*, that—

A pre-emption entry can not be amended to include a tract that was not embraced within the original filing and entry for the reason that the pre-emptor then supposed that said tract was not subject to such appropriation.

The Department has held in *ex parte* Kesling (19 L. D. 43) and Robert C. Bell (*idem.*, 177), that where the land adjacent is unsurveyed at the time of the allowance of the entry, the entry could be amended so as to include the settlement of the homesteader, but in no case has the right of amendment been allowed to one who makes entry upon land and takes less than he might have taken had he informed himself of the status of the records of the local office.

Your office decision is affirmed.

RAILROAD GRANT—INDEMNITY SELECTIONS—INDIAN RESERVATION.

NORTHERN PACIFIC R. R. CO. (ON REVIEW)

Under the grant to the Northern Pacific indemnity may be taken in one State for losses sustained in another, though said losses might be satisfied from lands within the limits of the State in which said losses occur.

Selections of indemnity should be made of surveyed lands subject thereto nearest the lands lost.

The Northern Pacific under its grant is entitled to select indemnity for losses caused by an unsurveyed Indian reservation.

In order that the bases may be specifically designated in such a case the adjacent surveys may be projected by calculation over such reservation.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 12, 1895. (F. L. C.)

I have before me a motion, filed by the Northern Pacific Railroad Company, asking a review and reversal of departmental decision of October 14, 1893 (17 L. D., 404), in the matter of its list No. 16, of indemnity selections filed in the local office at North Yakima, Washington, on the 11th of October, 1888.

Said selections, embracing in the aggregate 21,102.20 acres in what is now the State of Washington, had for bases losses designated in the Coeur d'Alene Indian Reservation, in Idaho, having an estimated area altogether of 21,120 acres.

Your office held the selections for cancellation, for the reason that the losses are not arranged tract for tract.

The Department, on appeal, concurred in the view that the losses should be so arranged, but said that were there no other objections to the list, the losses might be rearranged.

It found other objection, however, in the fact that indemnity had been selected in Washington for losses in Idaho, and held that indemnity selections of land in one State for losses in another can not be allowed, until it is first shown that the losses can not be satisfied within the limits of the grant in the State in which they occur.

The company in its motion for review earnestly objects to the above ruling as placing a limitation or restriction upon the company in making its selections not contained in or contemplated by the grant.

There are several specifications of error which present the questions involved in different forms, but they need not here be set out in full.

The motion has been elaborately argued, both orally and by brief. The brief presents for consideration three propositions, viz:

1. The right of the company to select indemnity in the State of Washington in lieu of losses in the State of Idaho.

2. The right of the company to select indemnity in lieu of losses caused by an unsurveyed Indian reservation.

3. The necessity for specifying losses tract for tract within the selected lands.

The first question, as has been seen, was answered in the negative, in the decision a review of which is sought, with the qualification: "until it is first shown that such losses can not be satisfied from the lands within the limits of its grant in that State."

The company contends that the grant of July 2, 1864 (13 Stat., 365), places no State line limitations on the right of selection, but that under said act indemnity may be taken in one State in lieu of losses in another, although such losses might be satisfied from lands within the limits of the State in which said losses occur.

After careful consideration of this proposition, I am disposed to concede the correctness of the position thus taken, and to regard the question as settled by the opinion of Attorney-General Garland, which was adopted by my predecessor, Secretary Vilas (8 L. D., 13). That opinion was in response to certain questions asked by this Department, relative to the Northern Pacific grant, one of which was: "Can selections be made within the first (indemnity) belt for losses outside the particular State or Territory in which the same occurred?"

The Attorney-General replied that indemnity selections may be made within the first indemnity belt, irrespective of State or Territorial lines. After naming the statutory limitations or conditions in the matter of indemnity selections, he says:

These are all the limitations or conditions provided for by the act of 1864, subject to which the right to select is granted. Interpretation will not warrant the adding of another limitation that the lien lands must be selected in the same State or Territory in which the lands were lost.

In the decision sought to be reviewed that opinion was referred to, but was treated as not in conflict with the holding of said decision that selections could not be made outside the State in which the losses occurred until it was first shown that the losses could not be satisfied within the State. The distinction drawn was that the question submitted to and considered by the Attorney-General was, whether *under any circumstances* selections might be made within the first indemnity belt for losses outside the State or Territory in which the same occur.

After a careful examination of said opinion, I am now led to the conclusion that it was intended to be and was a broad and general answer, without limitation, condition or qualification, to a general question. No restriction or exception is mentioned or implied in the opinion, and Secretary Vilas seems to have understood that none was intended, for, in adopting and acting upon it, he said the opinion of the Attorney-General is to the effect "that indemnity selections may be made within the first indemnity belt, irrespective of State or Territorial lines."

The adoption of this view eliminates all question of State or Territorial lines from this case.

It has for years, however, been the doctrine of this Department that in all kinds of railroad grants providing for indemnity, the selections must be of lands subject thereto nearest the lands lost.

In general circular of instructions, relative to railroad indemnity selections, approved by Secretary Lamar, August 4, 1885 (4 L. D., 90), it was said, among other things:

When deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated land, within proper sections and limits, *nearest* the granted sections in which the loss occurred.

These instructions applied to the Northern Pacific in common with other roads.

This rule was adhered to by Secretary Noble in the case of the Atlantic and Pacific Railroad Company, decided March 29, 1889 (8 L. D., 373). That company has a grant very similar in its provisions to the grant to the Northern Pacific Company. See also case of Chicago, St. Paul, Minneapolis and Omaha Railway Company, 10 L. D., 147.

In the case of *Wood v. Railroad Company* (104 U. S., 329), the supreme court having under consideration a grant of quantity held that:

Although there was no express limitation of the distance from the road in which the land was to be selected, it was necessarily implied that the selection should be made of alternate sections nearest the road, of which the land had not been previously sold, reserved, or otherwise disposed of. The company was not at liberty to pass beyond land open to its appropriation, and take lands farther removed from its road. In all grants which are to be satisfied out of sections along a line of a road, it is necessarily implied, in the absence of specific designation otherwise, that the land is to be taken from the nearest undisposed sections of the character mentioned. Such grants give no license to the grantees to roam over the whole public domain lying on either side of the road, in search of land desired. The grants must be satisfied out of the first land found which meets the conditions named.

On principle and by analogy the doctrine of that case is applicable to this, and should govern.

We next have presented the question: Do the lands embraced in list No. 16 come within the rule above laid down—i. e., are they, within the meaning of said rule, selections of lands subject to selection nearest the lands lost in the Coeur d'Alene Indian Reservation?

They are in the North Yakima land district, Washington, and therefore quite a distance from the Indian reservation. It may be that there are sufficient available lands nearer those given as a basis for selection to satisfy all the losses. If so, these selections must fail on the basis given. As to whether there are sufficient lands available for selection nearer the lands lost than are the selections made, is a question which must be determined before it can be known whether list 16 can stand.

According to the rule laid down in the original decision in this case, it would devolve upon the company to make the showing that it can not get indemnity lands nearer those lost than are the selections in list 16, before it can get favorable action on said list. But as this is a question to be answered after an examination of the records of the land department, I think it should be determined by your office. In the examination to be made looking to such determination only such lands within the indemnity limits should, in my opinion, be taken into the calculation as are available for selection, by which is meant *surveyed* lands subject to selection. Atlantic & Pacific R. R. Co., on review, 17 L. D. 313.

This I consider a proper interpretation and application of the law, in view of the provisions and requirements of section six of the grant relative to survey. That section evidently contemplated the survey of the lands within the limits of the grant as promptly and rapidly as possible, in order that the company might get the benefit of its grant; and to hold that selections of indemnity must be indefinitely postponed because of delay in making surveys would be a harsh ruling, and one, in my judgment, not in harmony with the spirit and purpose of the law.

The next question presented by the argument of counsel is, that as to the right of the company to select indemnity for losses caused by an unsurveyed Indian reservation.

This was not passed upon in the original decision, it not being necessary in the view of the case there taken, but it was raised and an intimation of doubt expressed as to the right to make selection in such case.

Upon full consideration, I am satisfied that the right does exist. The only possible objection to it would be the want of ability to know or ascertain the area of lost lands. But that area may be readily ascertained, the boundaries of the reservation being known. The seeming objection, therefore, disappears.

Only one question remains—viz: Are the losses in the present list No. 16 sufficiently designated?

Said list is not now before me, but counsel state, in quotation, that they are designated as follows:

All sections, 3, 5, 7, 9, 17, 19, 21, 29 and 31, town 46 north, range 2 west. All odd numbered sections, town 48 north, range 2 west. All sections 7, 9, 13, 15, 17 and 19 in township 49 north, range 2 west.

The area in each township is given, it is said, and the gross area is put down as 21,120 acres.

As has been said, your office decision, on appeal from which departmental decision now under review was rendered, rejected the list for the reason that the losses were not arranged tract for tract with the selected lands, and the Department on appeal held that, there can be no question but that its decisions (citing cases) require that the losses must be stated tract for tract with the selected lands, in no case exceeding a section, but further said: "Were there no other objection to the list, however, a re-arrangement of the losses might be allowed."

I see no good reason for changing the holding above referred to, provided a statement of the losses tract for tract as required is practicable.

The lost lands are in an unsurveyed Indian reservation, but the surrounding lands appear to have been surveyed, and I see no reason why the surveys may not by calculation, and without difficulty, be projected over the reservation so as to specifically describe the lost sections tract for tract with the selections. The regulation of August 4, 1885 (4 L. D., 90), and the holding of the Department in the case at bar, will be adhered to on this point, and, if in adjusting the list and adjudicating the same under the views herein expressed no other objection be found, a re-arrangement of the list, in accordance with the order made in the case of *La Bar v. Northern Pacific Railroad Company* (17 L. D., 406), will be allowed.

The decision of October 14, 1893, is modified to conform to the rulings herein made.

RAILROAD GRANT—CANCELLATION—ACT OF APRIL 21, 1876.

Modified, 22 L. D. 2243, overruled in
NORTHERN PACIFIC R. R. Co. *See also in*
Conflict 29 L. D. 550

The effect of a final judgment of cancellation is not impaired or diminished by failure to formally note of record the cancellation of the entry in question.

An entry erroneously allowed to remain of record after final judgment of cancellation can not operate to except the land covered thereby from the subsequent effect of a railroad grant.

The confirmation of entries under section 1, act of April 21, 1876, is solely for the benefit of the individual claimant, conditioned upon his compliance with law, and was not intended to confirm the entry absolutely, as against the right of the company, so as to except the land from the grant in favor of any other settler.

The case of the *Northern Pacific R. R. Co. v. Burns*, 6 L. D., 21, overruled.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 12, 1895. (E. F. B.)

This case involved the right to the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ Sec. 33, T. 1 N., R. 4 E., Bozeman, Montana, which is within the limits of the grant to the Northern Pacific Railroad Company as definitely located July 6, 1882, and was also within the limits of the withdrawal upon map of general route filed February 21, 1872, but notice of said withdrawal was not renewed at the local office until May 6, 1872.

The tract is claimed by the Northern Pacific Railroad Company as a part of its grant, for the reason that at date of definite location it was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption, or other claims or rights. So far as appears from the record, the tract was free from claim at the date of the grant to the company, July 2, 1864 (13 Stat., 365).

The records of your office show that Silas H. Murray made homestead entry of the tract in controversy, with other land, April 22, 1872. On November 22, 1874, his entry was held for cancellation as to the land in controversy, for conflict with the withdrawal upon general route, and no appeal was taken from said action.

On February 9, 1885, the local officers forwarded the relinquishment of Murray as to the tract in the even section, which was accepted by the local officers, and his entry as to said tract canceled upon the records of the office.

On April 2, 1885, your office directed the local officers to inform Murray that the decision of November 27, 1874, holding the entry for cancellation, had not been declared final as to the tract in the odd numbered section and that he might submit proof of his qualifications as a settler and to show compliance with the homestead law, if he desired to have his rights to said tract considered under the act of April 21, 1876 (19 Stat., 35). Murray took no action upon this information, and your office further instructed the local office to ascertain whether Murray was still residing upon and claiming the land.

The local officers, on February 18, 1890, reported that Murray was not residing upon the land, nor claiming it, whereupon your office, by the decision appealed from, assumed to cancel the entry of Murray as to the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 33, and directed the local officers to note the same upon their records.

On December 21, 1886, the Northern Pacific Railroad Company applied to list said tract as part of its grant, and said application was rejected, because it was covered by the homestead entry of Silas H. Murray, from which action the company appealed.

Your office, by decision of March 4, 1890, affirmed said action of the local officers, holding that the tract was excepted from the withdrawal on general route by a valid entry capable of being perfected under the act of April 21, 1876, and that said entry being of record and uncan-

celed at date of definite location excepted the tract from the operation of the grant.

From this decision the company appealed, assigning the following grounds of error:

1. Error to rule that "at the date of the receipt of the notice of withdrawal upon general route at the local office May 6, 1872, there was a valid homestead entry existing upon the said tract which was capable of ripening into a patent under act of April 21, 1876."

2. Error to rule that "the said entry being of record and uncanceled, July 6, 1882, excepted the land from the operation of the grant upon definite location."

3. Error not to have ruled that the entry of Murray was unlawful, because made after the filing of the map of general route.

4. Error not to have ruled that the entry being unlawful and Murray not asking or seeking the benefits of the act of April 21, 1876, it could not take the land from the grant to the company.

5. Error in not recognizing the right of the company to list said land as part of its grant.

The entry of Murray as to the tract in controversy was held for cancellation by decision of the Commissioner of November 27, 1874, subject to the right of appeal to the Department within sixty days. No appeal was taken by Murray, and by such failure to appeal within the time required by the rules, said judgment of cancellation became final. Said decision was not an order or rule to show cause why the entry should not be canceled, but an adjudication by the Commissioner canceling the entry that might have been vacated upon appeal to the Secretary, but which by failure to appeal became final. The act of entering upon the records the former cancellation of such entry was merely ministerial, not necessary to the finality of the judgment, and the failure to make such formal entry could not in any manner impair or diminish the force and effect of the judgment of cancellation. It was therefore error to hold that the entry of Murray was uncanceled at the date of definite location of the road.

Your office held that at the date when notice of the withdrawal upon general route was received at the local office, the entry of Murray was a valid homestead entry, existing upon said tract, which was capable of ripening into a patent under the act of April 21, 1876, and which therefore excepted the tract from said withdrawal.

Conceding that said entry might have been confirmed under the act of April 21, 1876, if the entryman had availed himself of the provisions of the act, yet the entry having been canceled, and no effort having been made to perfect title to said entry under the provisions of the act, there was no claim existing at date of definite location that would except it from the operation of the grant.

Under the 6th section of the act of July 2, 1864 (13 Stat., 365), making the grant to this road, the filing of an approved map of general route with the Secretary of the Interior was the only act required to make the withdrawal provided therein effective. Upon the filing of such map the statute itself withdrew from sale or pre-emption the odd sections

thereby granted within the prescribed limits, which withdrawal became effective from the date of said filing, and was not dependent upon the act of the Secretary formally announcing their withdrawal, which only gave publicity to what the law itself declared.

After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed. *Buttz v. Northern Pacific Railroad Company*, 119 U. S., 55; *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S., 1.

Your office held, however, that the right of Murray to have his entry perfected under the act of April 21, 1876, was such a right existing at date of definite location as would except the tract absolutely from the operation of the grant, whether he availed himself of the provisions of the act or not, citing *Northern Pacific Railroad Company v. Burns*, 6 L. D., 21.

The first section of the act of April 21, 1876 (19 Stat., 35), provides:

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land-Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

It is clear that this act was intended solely for the relief of *bona fide* settlers who had made entry of lands within railroad limits without notice of the withdrawal, and who had complied with the law, and was not intended to limit or restrict the right of the road, except so far as it conflicted with the claims or rights of *bona fide* settlers, who had made entry subsequent to the withdrawal for the benefit of the road and before notice of such withdrawal was received at the local office.

The language of the act does not indicate that it was the intention of Congress to add any other condition to the grant than what is expressed in the granting act that would except from the operation of the withdrawal lands to which the right of the company had then attached by force of the statute, except so far as to protect the pre-emption and homestead entries of *bona fide* settlers, who made their entries prior to receipt of notice of such withdrawal at the local land office, and who had complied with the law under which the entry was made. It is purely a remedial statute for the relief of the individual claimant, who is required to show compliance with the pre-emption or homestead law as an essential requisite to confirmation of the entry under said act. If the entryman had failed to reside upon the tract entered and to otherwise comply with the law under which the entry was made, it was not confirmed, and, hence, if at date of definite location the entryman had

not complied with the law, his entry would not be such a claim as would except the tract from the grant, even in favor of the entryman himself.

The construction given to this act by the decision in the case of *Northern Pacific Railroad Company v. Burns*, 6 L. D., 21, and in the case of *Jacobs v. Northern Pacific Railroad Company*, ib., 225, is that the act confirmed all entries made prior to the receipt of notice of withdrawal at the local office, and that entries remaining of record uncanceled at date of definite location excepted the tract from the operation of the grant, although the entryman did not avail himself of the benefit of said act.

This ruling is not sustained by the language of the act, the clear intent and purpose of which was to confirm only such entries where the law had been complied with and proper proofs have been made of such compliance by the parties holding such tracts. The confirmation was solely for the benefit of the individual claimant, conditioned upon his compliance with the law, and was not intended to confirm the entry absolutely as against the right of the company, so as to operate as an exception to the grant in favor of any other settler. *Olney v. Hastings and Dakota Railroad Company*, 10 L. D., 136.

This view seems to be clearly in accord with the former rulings of the Department, as announced in the case of *St. Paul, Minneapolis and Minnesota Railway Company v. Evenson*, 5 L. D., 144, and cases therein cited. The case of *Northern Pacific Railroad Company v. Burns*, *supra*, and other cases ruled thereby being in conflict with such former ruling, and with the decision in the case of *Olney v. Hastings and Dakota Railroad Company*, *supra*, they are hereby overruled.

Your office decision is reversed.

HOBBS v. GOULETTE ET AL.

Motion for review of departmental decision of April 21, 1894, L. D., 409, and rehearing therein, denied by Secretary Smith, March 12, 1895.

RELINQUISHMENT—FRAUD—INTOXICATION.

JOHNSTON v. LEAVENWORTH.

A party who seeks to invalidate a written release of his interest in a tract of land, on the ground that it was obtained from him while in a state of intoxication, must establish the fact that he was at such time deprived of the use of his reason and understanding through his intoxicated condition.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 12, 1895. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 12, T. 24 N., R. 17 E., W. M., Waterville land district, Washington.

The plat of survey of this township was filed in the local office March 6, 1893.

The record shows that on October 7, 1892, Charles F. Leavenworth located Valentine scrip on this tract; that William E. Johnston, May 3, 1893, made homestead application to enter the land in controversy, alleging settlement on April 25, 1892; that soon thereafter he built a house on the land which was destroyed; that a second house was built which was also destroyed; and that he had been kept away from the place by threats of personal violence.

A hearing which was ordered for July 28, 1893, was rendered unnecessary by Leavenworth filing on July 14, 1893, the waiver and surrender executed, by William E. Johnston, of all claim or interest in the land. Upon receipt of this abandonment of claim by the contestant, the local officers closed the case.

July 15, 1893, William E. Johnston, the appellant herein, filed a motion praying for the granting of time in which he might show that the waiver was not his voluntary act, but was induced by fraud and intimidation, he being at the time of its execution under the influence of liquor.

Upon the showing thereafter made your office ordered a hearing upon the original ground of contest and to ascertain the true facts surrounding the execution of the waiver of claim to the land.

The case then came on for trial on October 16, 1893. For the purposes of this decision it is only necessary to inquire into the facts surrounding the execution of the waiver, and upon this question the local officers found as follows:

1st. That Johnston executed the withdrawal in the city of Spokane, Washington, on the 10th day of July, 1893.

2d. That he read the relinquishment, or withdrawal, before signing it, and was fully aware of its contents.

3d. That he was in a normal condition of health and mind and neither drunk nor in fear of bodily harm.

4th. That he was paid and accepted as a consideration for executing the withdrawal the sum of three hundred and thirty dollars.

From these facts we find that the affidavits alleging duress in obtaining the relinquishment, are not sustained. We think the withdrawal should be accepted and the case closed. This seems to us in line with *Hagan v. Severn*, 15 L. D., 451.

Upon appeal, duly filed by Johnston, your office decision of May 21, 1894, was rendered, wherein you affirmed the finding of facts of the local officers and sustained their application of the law. From this decision Johnston again appealed, alleging error, substantially, of fact.

I have carefully re-examined the evidence, and whilst it is not of the most satisfactory nature—the witnesses being principally parties in interest to this suit—yet, in view of the fact that the local officers have the best opportunity of forming a just estimate of the value of the different witnesses' testimony, and of the well established rule of this Department that the concurring decisions of your office and the local office upon a question of fact—where the evidence is conflicting—will not be disturbed unless shown to be against the clear preponderance of

the evidence, I am of opinion that the judgment appealed from should be affirmed.

The mere fact that the land is worth from forty to fifty thousand dollars, and that the waiver was secured for \$330.00 is not in itself, as argued by counsel, evidence of fraud. It may be that Johnston had no such case as would have ended in his securing the cancellation of the Valentine scrip.

An application for rescission of an agreement is not a matter of right upon the part of the petitioner, but must be addressed to the sound discretion of the court, to be granted or refused upon what appears to be just and proper. *Mortlock v. Butler* (10 Ves., 293.)

It is not enough to show that the party executing a written instrument was drinking at the time, or was even intoxicated; the showing must go further and present "excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding." (Story's Equity Jurisprudence, Vol. I., 231.) The evidence makes no such showing; on the contrary it is not even clearly shown that Johnston was at all intoxicated.

There is contained in the record the application of James Reid to make homestead entry of this tract, together with his affidavit that the defendant herein located his scrip by false and fraudulent showing, but inasmuch as your office decision failed to pass upon this question, and in view of the fact that in the settlement of public land questions a decision by you is contemplated, prior to the final judgment of the Department, this portion of the record is returned for your consideration.

Judgment affirmed.

CONTEST—COSTS—MOTION TO DISMISS.

HANSEN v. NILSON ET AL.

If at any stage of the proceedings in a hearing prior to closing the same, the contestant waives his preference right of entry, or declines to pay the costs, as required under Rule 54 of Practice, the case should proceed as though begun under Rule 55.

Where the defense, without introducing evidence, files a motion to dismiss, which is sustained by the local office, and such action on appeal is found erroneous, judgment should not be rendered on the testimony submitted by the plaintiff, but the case should be remanded with opportunity given to the defendant to submit his testimony.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 12, 1895. (J. L. McC.)

This record presents the appeal of Nels Hansen from your office decision, dated June 8, 1892, in the case of said Hansen v. Andrew Nilson and L. R. Freeman, involving the NE. $\frac{1}{4}$ Sec. 28, T. 21 N., R. 6 W., Olympia, Washington.

On November 14, 1884, Andrew Nilson made cash entry under the timber and stone act of June 3, 1878 (20 Stat., 89), for the said land.

On October 5, 1889, Nels Hansen filed his affidavit of contest against said entry, alleging that the tract was good agricultural land and not subject to entry under the act of 1878, *supra*. Hansen also asked a hearing to enable him to prove said allegation, "with a view to the cancellation of said timber land entry, and securing a preference right to file thereon." Upon the record of a hearing (at which the contestant appeared and submitted testimony and the entryman made default) had on said contest, the local officers by decision dated February 3, 1891, found that the entry should be canceled.

Subsequently, upon application of L. R. Freeman, claiming as transferee of said entryman, your office by letter dated October 12, 1891, ordered a rehearing. Thereupon, after continuance, the contestant and said transferee, appeared with counsel before the local officers February 10, 1892.

The contestant submitted the testimony of several witnesses and rested.

The register and receiver then decided that before proceeding the contestant advance the costs for defendant's testimony. This the contestant refused to do, and at the same time, his counsel waived "all preference right that may accrue to him under the act of May 14, 1880," and moved that the hearing be proceeded with, each party to pay the costs of his own testimony.

The local officers overruled said motion and on motion of counsel for the defence, dismissed the case.

The contestant appealed, whereupon your office by its said decision of June 8, 1892, affirmed said action and directed that he (contestant) be allowed "sixty days to either make the required deposit or appeal" from said decision of your office.

Thereupon Hansen filed the pending appeal.

Your office held, in effect, that under the prevailing authorities Hansen's contest came within the purview of section 2, of the act of May 14, 1880 (21 Stat., 140); that payment of the land office fees being a prerequisite to the preferred right provided for by said section, Hansen must pay the costs hereinbefore referred to, and that his waiver of said right could not operate to relieve him of such liability.

I do not concur in that view of the interests involved in a contest case. Where a contest, commenced under Rule 54, has been sustained by the testimony offered by the contestant, the claimant is put upon his defense, whether the contestant claims the preference right or not. If at any stage of the proceedings prior to closing his case the contestant waives the preference right of entry, or if he should decline to pay the cost, as required by Rule 54, the case should proceed as if it had been commenced under Rule 55. There is no rule to force contestant to pay

all costs of the proceeding if he should waive the preference right of entry, and if he should refuse to pay all cost as required by Rule 54, he would then forfeit the preference right, and the government would continue the prosecution of the case if the testimony submitted by the contestant showed that the claimant had failed to comply with the law.

The government is a necessary party to every proceeding under a contest, and it is the duty of its officers to guard and conserve its interests as they may appear. Where a contestant at any stage of the proceeding drops out of the case, leaving a record of testimony clearly showing that the entry should be canceled, it is the duty of the government to act upon it and to cancel the entry, and to restore the land to the public domain.

In the case at bar, the testimony of the witnesses introduced by the contestant shows that about half the tract in controversy is "bottom land," with rich soil, that "would raise such crops as grow in this country and climate abundantly." Upon this there is a small growth of brush and trees scarcely larger than brush—salmon-brush and huckleberry, with a "few scattering trees" of "branchy fir" and hemlock; one witness says, "all rotten, limby, and knotty stuff—I wouldn't think of putting a road in there for it." The other half of the tract is somewhat higher ground, with soil not quite so deep and rich as the bottom-land, but yet quite productive; witnesses owning land in the vicinity testify that they have raised crops upon similar land that "grew abundantly;" such land has been shown by experience to be excellent for fruit raising; there are no high hills, or ravines, or other obstacles to plowing the whole of it; one could drive all over it with a team and wagon, if the trees were out of the way; the upland is better timber land than the "bottom-land," but the trees are small and scattering—"young sapling timber not very large, and once in a while an old growth of timber mixed in." There is a great vagueness in the testimony as to the height or diameter of the trees, or the number to the acre; but the uniform tenor of the testimony is that as a whole the tract is very poorly timbered, and is very good agricultural land—some of it excellent.

The object of the hearing was to establish the illegality of the entry; and as a *prima facie* case was clearly made out, the contest should have proceeded to judgment. It would appear, from the testimony taken, that the entry should be canceled; but it would be error to cancel it without allowing the entryman an opportunity to rebut the proof offered against him (James Copeland, 4 L. D., 275). The record is therefore herewith returned, and you are instructed to remand the case to the local officers, whom you will direct to continue the hearing, at as early a date as practicable, after giving all parties due notice of the same. If at the time set for the hearing the defendant should appear and offer evidence, the local officers will render such decision as shall seem to

them proper, in view of the entire record; if the defendant should offer no evidence, then, in view of the testimony heretofore offered, the entry should be canceled.

The decision of your office is modified as above indicated.

FLOOD ET AL. v. NORTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of October 9, 1894, 19 L. D., 227, denied by Secretary Smith, March 12, 1895.

PRE-EMPTION ENTRY—EQUITABLE ACTION.

E. KRAEMER ET AL.

A pre-emption entry erroneously allowed of land reserved for the benefit of a railroad grant, and subsequently canceled on account of its illegal character, may be reinstated with a view to equitable action thereon for the protection of a bona fide transferee, it appearing that the right of the railroad company has been forfeited by statutory enactment, and that the land has been restored to the public domain.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 12, 1895. (F. W. C.)

With your office letter of July 27, 1893, were forwarded the papers in the matter of the appeal by Mrs. E. Kraemer, assignee of Jacob Gumlich, for the re-instatement of the latter's pre-emption entry covering the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 11, T. 14 S., R. 18 E., New Orleans land district, Louisiana, which entry was canceled for conflict with the grant for the New Orleans, Opelousas and Great Western Railroad Company, by your office letter of September 12, 1860.

This land was within the indemnity limits of the grant made by the act of June 3, 1856 (11 Stat., 18), to aid in the construction of a road from New Orleans by Opelousas to the State line of Texas.

This grant failed to designate the particular sections within the indemnity limits from which selections were to be made in satisfaction of the same, and the election was left to the company which succeeded to that grant to specify from which it would make selection, whether of the odd or even numbered sections, and on April 17, 1857, the company elected to take the odd numbered sections.

The line of road had been definitely located on December 5, 1856, and the lands had remained in a state of reservation since May 31, 1856, so that, under the rulings then in force, it was held that the company's right to the odd numbered sections within the indemnity limits dated from the time of its election, namely, April 17, 1857.

For some reason, however, Jacob Gumlich was permitted by the local officers on May 15, 1858, to file pre-emption declaratory statement for the

tract under consideration, in which statement he alleged settlement on April 15, preceding, and on May 18, 1859, he made proof and payment thereon and cash certificate No. 3465 issued upon said pre-emption claim on that date.

Said entry was clearly illegal, having been made after the reservation of lands on account of the grant, and on October 17, 1859, the tract under consideration was certified to the State on account of the grant without apparent notice of said entry, the same not having been canceled until September 13, 1860, as before stated.

It now appears that on June 14, 1859, after the issue of certificate, Gumlich transferred the land under consideration to the husband of Mrs. E. Kraemer, the present applicant, and the land has since been held by the Kraemers, who have made the same their home, paying taxes thereon to the State.

On March 15, 1877, Mrs. Kraemer applied to have the cash entry by Gumlich re-instated, which application was rejected by your office letter of March 22, 1877; from which action she appealed. Said appeal does not appear to have ever received consideration by this Department until the present time.

It might be here stated that the grant made by the act of June 3, 1856, *supra*, was forfeited by the act of July 14, 1870 (16 Stat., 277), and the title resumed as to all lands which had not been lawfully disposed of by the State under said grant.

In submitting said appeal, your office letter of July 27, 1893, states that on February 24, 1888, the governor of Louisiana reconveyed the land in question to the United States. It must therefore be held that this land was in no wise incumbered by the act of 1856, *supra*, and that the same is subject to disposition as other public land under the terms of the act of forfeiture before referred to.

Your office letter of July 27, 1893, before referred to, suggests that the entry under consideration might be re-instated under the provisions of the act of March 3, 1887 (24 Stat., 56). Said act provides only for the re-instatement of entries erroneously canceled for conflict with railroad grants or withdrawals, and as this entry was not erroneously canceled it can not be held to come within the contemplation of the provisions of said act.

It seems to me, however, from a careful consideration of the matter, that the facts presented show Mrs. Kraemer to be entitled to equitable relief. Gumlich was permitted by the local officers, as before stated, to file declaratory statement for this land, to make proof thereunder, and his money paid upon said entry has ever since been retained by the United States. The husband of the present claimant, acting upon the certificate issued upon said entry, bought the land of Gumlich and he and his family have since made their home on said land and its present value is undoubtedly largely due to their expenditure of time and money in its improvement. The land having been returned to the

United States, and there being no other adverse claimant, it would seem that the United States is under an obligation to protect these claimants who undoubtedly were misled by the action of the local officers.

I fail to find any rule under which this case might be submitted to the board of equitable adjudication, except as a special case, but the equity, as presented, would seem to be within the spirit of several of the rules.

In view of the language of section 2450, Revised Statutes, which authorizes the board of equitable adjudication "To decide upon principles of equity and justice as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the Interior," I am of the opinion that said entry might be re-instated and the same be submitted in a special letter for the confirmation of the board of equitable adjudication.

Herewith are returned the papers in the case for action in accordance with the directions herein given.

OKLAHOMA TOWNSITE—TOWN LOTS.

ROSS *v.* SCHREIER.

The townsite board, in contest proceedings, may properly require from claimants a deposit to cover the costs and expenses of such proceedings.

Improvement and occupancy of a town lot subsequent to the date of the townsite entry do not entitle the claimant to a deed.

Secretary Smith to the Commissioner of the General Land Office, March 12, 1895. (E. E. W.)

This is a contest for lot 18, block 41, Alva, Oklahoma. The contestee, Albert Schreier, filed application for deed October 2, 1893, alleging, among other things, that he had made improvements, and was then residing upon and in possession of the lot. On the 27th of December following, the contestant, A. J. Ross, also applied for deed, alleging that he had built a house on the lot and was then occupying the same; that Schreier's application was fraudulent, and all the allegations therein contained untrue. The contestee, Schreier, moved to dismiss the contestant's application. The second paragraph of this motion, the only one necessary to be noticed here, was in substance that as the land embracing the lot in controversy had been entered as a townsite, contestant's subsequent improvement and occupancy thereof could not entitle him to deed. The townsite board took judicial notice of the fact that the land was entered as the townsite on the 26th of October, 1893, twenty-four days subsequent to the filing of contestee's application, and two months prior to the filing of contestant's, overruled the first and third paragraphs of the motion, and sustained the second. The contestant declined to proceed further with the trial, and appealed from

so much of the ruling as sustained the said second paragraph of the motion to dismiss. In his appeal he also complains that the townsite board required him to deposit \$25.50, to cover costs, and he alleges that as one of his assignments of error. This latter ruling is not shown in the transcript from the townsite board, but counsel for the contestee admits in his argument that it is true. The General Land Office affirmed the rulings of the townsite board on both points, and the contestant appealed to this Department.

The act of Congress of May 14, 1890, 26 Stat., 109, provides that when a townsite has been entered by townsite trustees, "the Secretary of the Interior shall provide regulations for the proper execution of the trusts by such trustees." Pursuant to this provision, this Department made a regulation, July 10, 1890, in which townsite boards were directed, in the trial of contests, "to require each claimant to deposit with the disbursing officer of the board each morning, a sum sufficient to cover and pay all costs and expenses on such proceedings for the day," 11 L. D., 24. By the joint resolution of Congress of September 1, 1893, all the provisions of the said act of May 14, 1890, were made applicable to that part of Oklahoma known as the "Cherokee Strip," in which the town of Alva was located, and this extension of the act carried with it the regulation above cited. Thus it is seen that by requiring the contestant to make the deposit the townsite board did not transcend its authority, but only complied with the express provisions of the law.

As to the second paragraph of the motion to dismiss: The townsite entry was made October 26, 1893, and the contestant did not apply for deed until the 27th of December, two months afterwards, and he only alleges that he had built a house on the lot and was then occupying the same. That is not sufficient. The statutes only authorize the entry of townsites "in trust for the several use and benefit of the occupants thereof," and to establish his right to deed the applicant must allege, and prove if controverted, that he had improved and was in rightful actual possession and occupancy of the lot, or rightfully entitled to such possession and occupancy, at the date of the entry of the land as a townsite. Rev. Stat., section 2387; 26 Stat., ch. 207; *Bender v. Shimer*, 19 L. D., 363. This the contestant did not do, and his allegation of improvement and occupancy subsequent to the date of the entry of the townsite does not entitle him to a deed.

The question of the validity of contestee's claim of right to deed is not before the Department, and no opinion is expressed in that regard.

The decision of the General Land Office affirming the rulings of the townsite board appealed from is affirmed.

MINING CLAIM—KNOWN LODE WITHIN PATENTED PLACER.

SOUTH STAR LODE (ON REVIEW).

When it is ascertained by inquiry instituted by the Department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, it must be held that the land embraced in said lode is reserved from the operation of the conveyance by the general terms of exception therein, and that patent may issue therefor, if the law has been in other respects fully complied with.

The case of the Pike's Peak Lode, 14 L. D., 47, overruled.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 12, 1895. (G. B. G.)

This is a motion for review of departmental decision of September 21, 1893, (17 L. D., 280).

The land involved is lot No. 363, Helena, Montana land district, and is designated as the South Star Lode claim.

On September 1, 1887, Noah J. McConnell *et al.*, made mineral entry for said lot, and on November 28, 1890, the matter coming before your office in the course of business, it was there held that:

This entry conflicts throughout its entire extent, with two entries, one of which, the Noyes Placer, Helena, Montana, mineral entry No. 511, was patented July 28, 1880, and the patent includes the ground in conflict.

The other conflict is with Helena, Montana, mineral entry No. 729, also the Noyes Placer, application for patent for which (including the ground in conflict herewith) was filed September 12, 1881, more than five (5) years prior to this application.

This case clearly comes within the purview of the decision of the Department in the case of the "Pike's Peak" Lode claim, (10 L. D. 200).

Under, and by virtue of the authority of said decision, said mineral entry No. 1572 is hereby held for cancellation.

Appeal was had to the Department, but subsequently the case was suspended, awaiting a decision of the local court upon an action instituted by the lode claimants to determine the question of priority of right between themselves and the placer claimants as to the property claimed by said lode claimants, and by force of the statute excepted out of the placer application and patent.

On May 23, 1893, a certified copy of a judgment rendered in the district court of the second judicial district of Montana April 13, 1893, was filed with the record. The case was then considered here, and the aforesaid departmental decision of September 21, 1893, was promulgated, in which the judgment of your office was affirmed, except as to certain relinquishments, which need not now be noticed.

The Department held in the opinion under review, that:

The judgment presented here does not show that the lode was "known to exist at the time" the ground was patented as a placer. Neither does the judgment show that the action was against the placer claimants, or that it involved any issue that

would affect the prior patent. It declares that the "plaintiffs are the owners, and entitled to the possession, and were such owners in possession, and entitled to the possession at the time of the commencement of this action." That being true, does not bring the case within the rule announced in the cases cited, especially in view of the fact that it does not give the date "of the commencement of this action."

The opinion then turned on a question or questions of fact, and inferentially it was held that if the judgment presented had shown that the lode was known to exist at the time the ground was patented as a placer, and that the action was against the placer claimants, or that it involved any issue, that would affect the prior patent, and had shown when the action was instituted, the conclusion reached in said decision would have been different.

The controlling question of the case is one of jurisdiction, and, assuming that it will not be seriously contended that the judgment of a State court could in any event reinvest the Department with jurisdiction, when original jurisdiction had been lost, it remains to be seen whether such jurisdiction is lost over a "known lode claim" within the boundaries of a patented placer claim, such lode being known to exist at the date of the issuance of the patent, and in general terms reserved and excepted from the operation of the conveyance.

The judgment of the district court of Montana is only important in determining the facts upon which the Department may act in assuming jurisdiction. This judgment, together with a certified copy of the court record, and the findings of the jury in an action instituted December 24, 1890, by lode claimants, shows that the South Star Lode claim was discovered December 2, 1878, a valid location made thereof, and the same marked upon the surface, so that the boundaries thereof could be readily traced. That the locators of said South Star Lode claim made and filed for record a declaratory statement of the location, on oath, describing the claim located by reference to a permanent monument, or natural object, such as was an identification of the claim, and including the names of the locators, and the date of the location, in the office of the County Recorder of Deer Lodge county, Montana, on or before the 5th day of December, 1878.

The placer application was filed December 17, 1878, and patent issued therefor July 28, 1880. It appearing therefore that there was a known lode claim within the boundaries of the land covered by the placer application and patent, at the time such application was filed, it remains to be seen whether the Department has jurisdiction under the law to issue patent for the lode.

Section 2333 of the Revised Statutes is as follows:

Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on

each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

The placer claimants herein did not include in their application this known South Star lode. They averred that no lode was known to exist within the boundaries of the placer claim. The patent issued to them contained the express reservation:

That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed, or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents.

In *Noyes v. Mantle* (127 U. S., 348), which was a suit in equity to determine the adverse claims of lode and placer claimants to a known lode claim existing at the time the application was made for the placer patent, and therefore in all essential features the same as the case at bar, it was said:

There is no pretence in this case that the original locators did not comply with the requirements of the law in making the location of the Pay Streak Lode Mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent from the United States to render their title perfect, and that they could obtain at any time, upon proof of what they had done in locating the claim, and of subsequent expenditures to a specific amount in developing it. Until patent issued the government held the title in trust for the locators, or their vendees. The ground itself was not afterwards open to sale. The location antedates by some months the application of the defendant for a patent for his placer claim. The patent was subject to the conditions of section 2333 of the Revised Statutes.

Continuing, the court adopting the language used in *Belk v. Meagher* (104 U. S., 279, 283) said:

A mining claim perfected under the law, is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent." It is not, therefore, subject to the disposal of the government. A copy of the patent is not in the record, so we cannot speak positively of its contents; but it will be presumed to contain reservations of all veins or lodes known to exist, pursuant to the statute. At any rate, as already stated, it could not convey property which had already passed to others. A patent of the government cannot, any more than a deed of an individual, transfer what the grantor does not possess.

It will be remembered, however, that this is a delivery of the court of the United States within its own jurisdiction, and that the precise ques-

tion of departmental jurisdiction made in the case at bar is not mooted. But if, under the facts of this case, and the application of the law, as expounded in *Noyes v. Mantle* (*supra*), the lode claim in controversy is not only the property of the applicants, but the title thereto is still in the government, held in trust for said applicants, by all the analogies of the law, the United States may convey such title held in trust, to the *cestui que trust*, there being no question that the title remains in the government, it never having parted therewith, and not only that it may so convey, but in all conscience it should do so.

A patent is the instrument employed by the primitive owner of the soil to pass title to the same, as a deed is the instrument used to pass title between individuals after primitive title has been extinguished, and, "As a general proposition, a patent is necessary in order to pass a perfect, and consummate legal title to public lands, with one exception, namely, when an act of Congress grants land with words of present grant." (Washburn on Real Property, 3-192.) This being true, and the case at bar not coming within the exception to the rule, it follows that the lode claimants herein, although they are the adjudged owners of the property, by the district court of Montana, the judgment affords them no relief except to protect them in the possession thereof, it being clear that under the doctrine of *Noyes v. Mantle* (*supra*), the title to said lode claim did not pass to the placer claimants under their patent, was not in them, but remained in the United States, in trust for the lode claimants.

The district court was therefore without jurisdiction in the matter of title, and unable to adjudge a conveyance from the placer claimants.

The question as to whether this lode was or was not within the limits of the surface covered by the placer patent, involves no question of law, but depends upon two questions of fact: First, did a lode exist within the limits of the placer territory; and second, was it known to exist at the date of the application for the placer patent. The determination of these two questions of fact is conclusive as to whether the placer patent passed title to everything within its territory.

It has been suggested that the supreme court of the United States, in 135 U. S., 286, denied the right of the Department to issue patent to a lode claim lying within the boundary of land covered by a prior placer patent. But I do not so understand the decision. In that case patents had been issued to both the lode and placer claimants, and the question was as to the superiority of title under these patents, the decision depending on extrinsic facts not shown by the patents.

The lower court hold that the second patent which conveyed the lode claim to another person was conclusive evidence that the lode claim did not pass under the placer—the first—patent. The supreme court of the United States reversed the ruling of the lower court. In passing upon the effect of the finding by the Department, which resulted in the issuance of a patent, the court admits the correctness of decisions by

the different courts in which it is held that a finding of the land officers in regard to facts upon which a patent issues is conclusive until set aside for fraud; but the court limits the rule as follows (p. 292):

But those cases are cases in which no prior patent had been issued for the same land, and where the party contesting a patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent.

The court then proceeds to deal with the exact status of the parties in that case, and to emphasize the distinction between the rule laid down by the court in reference to the decisions of the land officers generally, and in a case like the one then before the court, as follows:

Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of these facts. We do not believe that the government of the United States, having issued a patent, can, by the authority of its own officers, invalidate that patent by the issuing of a second one for the same property.

There were presented to the court in that case two patents, the first a placer patent which embraced the territory covered by the second—a lode patent. The question of the power of the government to issue the lode patent, conveying a claim within the territory included in the placer—the first patent—was directly brought to the attention of the court, by the contest in that case, and the court proceeded in the discussion of the case upon the idea that this could be done. The court did not intimate that the Department could not issue the second patent, but held that such patent is only *prima facie* evidence that the lode claim did not pass under the prior placer patent. On this point the court said (page 293):

If it be said that the question of the reservation of this vein as a known lode under the law on that subject makes a difference in this respect, and that the land office has a right to inquire whether such lode existed, and whether its existence was known to the patentee of the first patent, we answer that a patent issued under such circumstances to the claimants of the lode claim, may possibly be such *prima facie* evidence of the facts named as will place the parties in a condition to contest the question in a court.

The foregoing quotations serve to show very clearly that the real meaning of the decision is that a finding by the Department to the effect that a lode claim does not pass under a placer patent is only *prima facie* evidence of that fact, and that this question may be inquired into by the courts after patent has issued to the lode claimants. The court further said in the decision quoted from (page 293):

But we are of opinion that it is always and ultimately a question of judicial cognizance. The first patent conferred upon Moyer the right to this vein and to all other veins within the limits of fifty acres of placer claim. There is excepted from that grant any lode existing and known at the time application was made for his patent. Whether such a lode did exist, and whether it was known to him, is a question which he had a right to have tried by a court of justice, and from which he cannot be excluded by the subsequent action of the officers of the land department.

There is nothing in this language which indicates that the court meant to decide that the Department is without jurisdiction in such cases until after the facts are found by some court of competent jurisdiction: On the contrary, the court in the use of the language: "It is always and ultimately a question of judicial cognizance," indicates clearly that the Department may decide in the first instance, but that the finding by the Department is not conclusive. It may be true that a finding of facts by the Department in such cases is not conclusive, but it by no means follows that the Department is not to assume jurisdiction until after the facts are found by a court of competent jurisdiction. The question as to whether any particular land or any interest therein has been patented, is one for the Department to decide for itself, and its finding is binding upon the parties until a contrary decision is made by a court of competent jurisdiction. If the inquiry discloses the fact that a patent to the particular land or particular interest therein has been conveyed by patent, then the Department is without further jurisdiction in the case. If, however, it is made to appear that such particular land or interest therein has not been conveyed the Department has jurisdiction to dispose of the same under the laws applicable to such lands or such interest in them. The Department can institute inquiry into the facts of each case and decide for itself whether the title to the interest in controversy has been passed by the patent, or delay action until the facts shall be found by some court of competent jurisdiction, and then act upon such finding of the court.

This contention is not only sound but is sustained by the case of the *Iron Silver Mining Co. v. Campbell*, 135 U. S., 236, *supra*.

After stating that such a case raises two questions for decision, first the existence of a lode or vein; second, whether if such lode or vein existed it was known to the placer applicant at the time he applied for patent, and that these questions could be better decided by a court than in an *ex parte* proceeding by the Department, the court said—

and while we are not prepared to say at this time that the land officers can not, on a *prima facie* case, decide the right of the applicant to such vein, and give him a patent for it, we are satisfied that in any conflict between the title conferred by two patents, whether it be in law or in equity, the holder of the title under the elder patent has a right to require that the existence of the lode, and the knowledge of its existence on the part of the grantee of the elder patent, should be established.

This argument proceeds on the idea that the Department has jurisdiction to issue a second patent, and is totally inconsistent with any theory denying such jurisdiction, for the reason that if it had been issued without jurisdiction it would have been void, and not considered by the court, in that case, as an evidence of title.

It may be well to remark that cases of this kind are very different from those cases where patent issued under the general land laws. In such case the entire title to the land passes: all the right, title and interest of the United States passes to the patentee. This being true,

the Department is without jurisdiction after the patent has issued. Such is not necessarily the case in respect of patents for mineral land. Two classes of mineral claims are recognized by the mining laws, a placer and a lode claim. Separate patents may issue for such claims, one conveying the placer, and the other the lode claim, and to different persons. These two claims may exist and often do exist within the same area. Both may pass under one patent, a placer patent; and this is done where the lode claim is not known at the date of application, or where it is known and the placer patentee includes it in his application for patent. If the lode claim is known at the date of the application, and is not included therein, the lode claim does not pass to the placer patentee, but the title to the lode claim remains in the United States. The object of the statute is to convey the minerals in the land, and the conveyance of the placer claim—one class—is not such a disposition of all interest in the land as to deprive the Department of jurisdiction unless the lode claim also passes by the patent.

There is no part of the decision in 135 U. S., *supra*, which conflicts with the foregoing views. In the case at bar a court of competent jurisdiction held that the placer patent did not convey the lode claim. The Department will act upon that finding as true and not inquire into the facts through its own instrumentality. The effect of the finding of the court which considered this issue is that the title to the lode claim did not pass under the placer patent and is still in the United States. This being true, the Department has jurisdiction to issue patent conveying the lode claim.

In the case of the Pike's Peak Lode, 14 L. D., 47, and other analogous cases, it is held that a placer patent for land including a known lode, not specifically described and excluded, operates to convey title to all of said land, and terminates the jurisdiction of the Department over the land conveyed thereby.

For the foregoing reasons, and in view of the fact, as already seen, that the supreme court, in the case of *Noyes v. Mantle*, had held in terms that the title to a known lode does not pass under a placer patent, I conclude that no suit is necessary to re-invest the United States with a title it has never been divested of, and that the doctrine of the Pike's Peak Lode case is wrong. Said case is therefore overruled, and all analogous departmental opinions are modified to conform to the views hereinbefore expressed.

And it is now held that when it has been ascertained by inquiry instituted by the Department or determined by a court of competent jurisdiction that a lode claim existed within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at the date of the application for such patent, and was not applied for, the land embraced in said lode is reserved from the operation of the conveyance by the terms thereof, and patent may issue for such lode if the law has been in other respects fully complied with.

The contention on the part of placer claimants herein, that they were entitled to notice of the motion for review, and that such notice was not given them within the time required by the rules of practice, is purely technical. The proceedings before the land department for securing title to government lands are usually *ex parte*, and the fact that the district court of Montana has decided that the placer claimants have no interest in the lode claim, makes this case essentially such.

The said departmental decision of September 21, 1893, is hereby revoked, and your office is directed to issue patent to the lode claimants for the lands adjudged to them, if the requirements of the law have been fully complied with.

CERTIORARI—MINING CLAIM—ABSTRACT.

GROUND HOG LODGE.

The writ of certiorari will issue to review final action of the General Land Office that is in effect the determination of a substantial right, and where the right of appeal therefrom is denied.

A relinquishment of an adverse mining claim should not be denied consideration on the ground that the accompanying abstract is not brought down to the date of said relinquishment; but due opportunity in such case should be given to file an amended abstract.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 19, 1895. (W. F. M.)

On December 28, 1892, James Casey made mineral entry No. 451, of the Ground Hog lode claim, situated in the SE. $\frac{1}{4}$ of section 7, township 10 S., range 84 W., of the land district of Glenwood Springs, Colorado, and on January 17, 1894, the entry was canceled by your office in so far as it conflicts with the Fraction, Leadville, and Little Per Cent lode claims.

On January 31, 1894, Mr. C. C. Clements, of this city, of counsel for the claimants, filed in your office a waiver of the right of appeal from the decision of January 17, 1894, and requested the issuance of patent for the part of the claim not in conflict, as aforesaid; but, on February 5, 1894, he addressed a letter to your office asking to be permitted to withdraw the waiver, on the ground that he had misapprehended the instructions transmitted to him by the local counsel of the claimants, an erroneous construction of which led him to take action for his clients not contemplated nor desired by them. The permission to withdraw was formally denied on February 19, 1894.

On April 10, 1894, Mr. Clements filed in your office an informal letter in which, for reasons not necessary to be stated here, he requested "a reconsideration of your decision" of January 17, 1894, and, on May 4, 1894, he filed relinquishments of the Leadville, the Little Per Cent and the Fraction claims in so far as they conflict with the Ground

Hog claim, together with abstracts of title thereto, and requested that the "order of cancellation be revoked and the entry be approved for patenting."

On July 9, 1894, your office denied these requests on the ground that the abstracts of title were not brought down to the date upon which the relinquishments were filed so as to show title in the persons executing them at that date, and on the further ground that the claims are involved in pending contests.

On September 16, 1894, a notice of appeal from your office decision of July 9, 1894, was filed, and, on November 8, 1894, your office rendered a decision denying the right of appeal for the reason that "the requests contained in the communications filed by Mr. Clements on April 9, and May 4, 1894, are equivalent to a motion for review of the decision of January 17, 1894, and the decision of July 9, 1894, was a decision denying the motion for review, from which appeal will not lie," citing Lyman C. Dayton, 10 L. D., 159.

Thereupon, on December 1, 1894, the present claimant of the Ground Hog claim, James Casey, through his counsel, C. C. Clements, filed here a petition, detailing the foregoing facts, and alleging that the final action taken by your office "was a determination of a substantial right and that by the denial of his right of appeal" he has suffered a material injury, and prays that the record be certified to this Department.

The specific errors charged are the refusal of your office to allow the withdrawal of the waiver of appeal, and not giving proper consideration to the abstracts of title.

Premitting, as unnecessary, any expression of opinion upon the proposition, broadly stated, that an appeal does not lie from a decision denying a motion for review, I do not concur in the view that the informal letters of Mr. Clements, of April 9, and May 4, 1894, are tantamount, in a technical sense, to a motion for review, or that your office decision of July 9, 1894, was merely a decision denying a motion for review. New and independent facts had been imported into the case, creating a new and different record with correspondingly new issues, and it was those that the latter decision adjudicated. The contention of the petitioner, therefore, appears to be well founded "that the denial of his right of appeal" inflicted "a material injury" for the reason that the decision from which appeal was sought determined "a substantial right." He must be held, therefore, to be entitled to the relief prayed for, but inasmuch as the record has been transmitted to this Department for consideration in connection with the petition, no formal order need be made.

The initial and substantial error complained of is the refusal of your office to give effect to the relinquishments filed by Casey, and this Department concurs in his contention that it was error to deny to them any consideration whatever on the ground that the accompanying abstracts of title were not brought down to the very date of their filing.

There appears nothing in the record to cast suspicion upon either of those instruments, and equitable considerations required that opportunity be given to show title at the date of the relinquishments. If it be true, as held by your office decision of July 9, 1894, that the claims here in controversy are involved in pending contests, that fact should only have the effect of suspending action until those contests have been finally disposed of.

The order prayed for, therefore, will be considered as granted, and it is directed that appropriate action be taken by your office in accordance with the views herein expressed.

PRACTICE—MOTION FOR REVIEW—EVIDENCE.

PEACOCK *v.* SHEARER'S HEIRS (ON REVIEW).

A motion for review will not lie for the consideration of matters that are then presented for the first time, and should have been submitted for determination in the original proceedings.

In an action against the heirs of a deceased entryman admissions of the decedent against his interest may not be proven by the testimony alone of the opposite party.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 19, 1895. (P. J. C.)

I have before me a motion for review of departmental decision of October 9, 1894 (Albert S. Peacock *v.* Shearer's heirs, 19 L. D., 211), filed by Peacock.

The present controversy arose over the fact that the attorneys of record for Peacock—N. Campbell and T. G. Outlip—filed in the local office a dismissal of the contest pending between the parties, involving the NE. $\frac{1}{4}$, Sec. 35, T. 15 N., R. 7 W., I. M., Kingfisher, Oklahoma Territory, land district. It was decided that "the action of an attorney of record in the dismissal of proceedings will be conclusive upon the party he represents, where his appearance is general in character and no showing of fraud or collusion is made." (Syllabus.)

Review of this decision is now asked. Quite a number of errors are assigned, but in so far as they apply to the judgment, they are addressed to matters that were therein considered, and no new points, either of fact or law, are suggested that require further attention. The specifications of error only go to the extent of questioning the decision of the Department upon the action of Attorney Campbell. Outlip's action in joining in the dismissal is not in any wise referred to. The motion might well be dismissed on this ground.

But "plaintiff alleges affirmatively that there was fraud and collusion between N. Campbell and Michael Shearer in the dismissal of said contest." This is now charged for the first time, and comes before the

Department as a specification of error in a former judgment, wherein it was held that there was no such charge.

Such practice will not be permitted. Every fact alleged in the affidavits accompanying the motion was, or should have been, known to the plaintiff when he made his original motion for re-instatement, and should then have been presented. The Department will not tolerate the practice of parties waiting until it has announced its determination of a given proposition, and then in a motion for review permit them to present, as a specification of error, matters calculated to cover the objections of the Department to the original proceedings. Trials by piecemeal will not be sanctioned.

But aside from this, the showing made is not sufficient to warrant any further action of the Department. The plaintiff seems to rely on the alleged admission made by Shearer in his lifetime. This cannot be proved by the testimony of the plaintiff alone. Shearer's lips are closed by death; the law would seal those of Peacock as to any conversation that may have occurred between them touching such a transaction as this, and there is no suggestion of any other testimony than his own on this point. It is shown that Shearer died May 23, 1892. The original motion and affidavits of Peacock that were finally filed and acted on were presented in September following. So it is clear that plaintiff was in possession of all the facts before his motion was filed.

Again, Mr. Cutlip, his attorney, now makes an affidavit that he did not sign or file the dismissal. If this be true, he must have been aware of the fact when he made his affidavit in support of the original motion, yet he did not deny his signature. Without commenting upon the similarity of the several signatures of Mr. Cutlip as they appear in this record, I will simply add that were it not for this sworn statement, no one would seriously dispute the strong probability that the same hand guided the pen that wrote his name in each instance.

The motion is therefore denied.

TIMBER-CULTURE ENTRY—HEIR—FINAL PROOF.

EWART *v.* CAREY'S HEIRS.

The heir of a timber-culture entryman, who in his lifetime had fully complied with the law, may submit final proof, notwithstanding he may have formed an intention to sell the land as soon as the patent therefor is obtained.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (I. D.)

The plaintiff in the case of George A. Ewart *v.* the Heirs of Thos. B. Carey, appealed from your office decision of March 17, 1893, involving timber-culture entry on W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 32, T. 22 N., R. 38 E., W. M., Spokane Falls land district, Washington, wherein the timber-culture entry of the defendants is held intact.

Thos. B. Carey made timber-culture entry of said land October 12, 1882.

In January, 1892, the will of said entryman was probated, by which will he left a homestead entry of one hundred and sixty acres adjoining this tract to his wife, and this timber-culture tract to his son Franklin A. Carey.

The date of the death of Thos. B. Carey does not appear but it was prior to December 12, 1891, for on that day the widow with Franklin A. Carey and the other heirs of the said entryman, joined in a warranty deed to one B. B. Glascock for both the homestead quarter and the timber-culture quarter for the named consideration of \$3200.

June 18, 1892, contest was initiated against the timber-culture entry, one of the grounds being this act of alienation to Glascock, and hearing was ordered on August 23, 1892.

July 1, 1892, Glascock quit claimed the timber-culture quarter back to Carey.

The evidence shows that there was an agreement between Franklin A. Carey and Glascock by which Glascock was to have both tracts: the homestead quarter at once, and the timber-culture quarter upon the title being perfected, the price to be \$1600 for each quarter.

Carey, at the hearing, claimed that the timber-culture quarter was in the deed by mistake and that he did not know it was there, but admits that he and Glascock, shortly before the deed was made, had talked it over and agreed on the price for each tract, and that the agreement was that Glascock was to have the timber-culture quarter so soon as Carey got the title.

Carey took no notes or other evidence of indebtedness for the consideration of either tract, and at the date of the hearing the homestead tract was not fully paid for, although Glascock was in possession.

Glascock appears to have been a responsible man, pecuniarily, and Carey trusted him to make the payments as Glascock trusted Carey to give possession of the timber-culture land when title should be acquired.

The evidence shows that this agreement between Glascock and Franklin A. Carey was at least a valid written contract for the land, with the intention to carry it out in good faith when the patent therefor was issued.

The final proof is clear that the entryman, T. B. Carey, during his lifetime fully complied with the law relating to timber-culture for more than eight years, and that a patent was thereby, in effect, earned before his death.

The entry was made in good faith and the law complied with fully before the heir made the agreement to dispose of it. There was no provision in the timber-culture act requiring final proof to show that no contract or agreement had been made to sell the claim, and the decision in United States v. Searles (12 L. D., 20), that "one who settles

on land in good faith and subsequently complies with the requirement of the law, intending to make the land his home, is not disqualified as a pre-emptor by the fact that through a change of circumstances he had formed an intention to sell prior to the transmission of final proof" seems to be applicable to this case.

No reason is perceived why the heir of an entryman, who had fully complied with the law, may not be permitted to make final proof, notwithstanding he may have formed an intention to sell as soon as patent should be obtained.

Your office decision is affirmed, the contest is dismissed, and the final proof is accepted.

REPAYMENT—DOUBLE MINIMUM EXCESS.

WILLIAM EDMONDSTON.

There is no authority for the repayment of double minimum excess erroneously charged for land reduced in price by section 3, act of June 15, 1880.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 19, 1895. (J. L. McC.)

William Edmondston has appealed from the decision of your office, dated September 11, 1893, rejecting his claim for repayment of one dollar and a quarter per acre—the difference between minimum and double-minimum price—paid upon his cash entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 12, T. 44 N., R. 13 W., Ashland land district, Wisconsin.

The third section of the act of June 15, 1880 (21 Stat., 237-8), provides:

That the price of lands now subject to entry, which were raised to two dollars and fifty cents per acre, and put in market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre.

The land in question is of the description specified in the act cited: It was subject to entry, its price had been raised to \$2.50 per acre, and it had been "put in market"—"offered"—at the double-minimum price June 14, 1856. It was therefore reduced to single-minimum price upon the passage of the act cited—June 15, 1880.

Your office decision does not give the date of Edmondston's entry; but in his application he states that he made said entry on the 11th of November, 1891; and as the subsequent decision and letters of your office contain nothing in contradiction of this statement it is safe to assume its correctness.

The denial of the application for repayment is based upon the fact that:

Under the construction placed upon the act of June 15, 1880, by Acting Secretary Joslyn to Commissioner McFarland, June 28, 1883 (2 L. D., 677), the repayment of \$1.25 per acre can not be made under the act of June 16, 1880.

In the decision of Acting Secretary Joslyn, above cited, the subject immediately under consideration was the scope and effect of the act of March 3, 1883 (22 Stat., 526), providing for the confirmation of sales of land at private entry, without having been re-offered (after reduction in price) at public sale; and the decision held that no provision for repayment of excess where sales had been made at double minimum was provided for by that act. It is not conclusive that under some other act repayment might not be allowed.

Existing legislation on the subject of repayment is as follows:

Sec. 2362 R. S., provides for repayment in cases where a tract of land "has been erroneously sold by the United States, so that from any cause the sale can not be confirmed."

The second section of the act of June 16, 1880 (21 Stat., 287), provides for repayment, "where, from any cause, the entry has been erroneously allowed, and can not be confirmed."

The last clause of the same section provides, further, for repayment "in all cases where parties have paid double-minimum price for land which has afterward been found not to be within the limits of a railroad land-grant."

This Department is not clothed with power to make repayments (where the money has been paid into the treasury) unless specially authorized by statute.

In the case at bar, the entry is not one that "can not be confirmed." On the contrary, it has been confirmed.

It can not be said that it is not "within the limits of a railroad land-grant."

Counsel for claimant contends that the case comes within the ruling of the Department in the case of Thomas Kearney (7 L. D., 29) and Jacob A. Gilford (8 L. D., 583)—in the latter of which the Department held "the spirit and intent of the act" to be "that in all cases where double-minimum was erroneously charged, repayment should be allowed."

As it must be conceded that in the case at bar double-minimum price was "erroneously charged," counsel for claimant contends that repayment should be allowed.

The cases cited, however, were not similar to the case at bar. In the cases cited, although the land had been within land-grant limits, said grants had been forfeited, and at the date of entry the land was "not within the limits of a railroad land-grant"—hence the provision in the second subdivision of the second section of the act of June 16, 1890 (*supra*), was applicable. In the case at bar, the land at the date of entry was, and is yet (there never having been any forfeiture) within the limits of a land-grant.

The decision appealed from was correct (see Joseph Brown, 5 L. D., 316); and the same is hereby affirmed.

DESERT LAND ENTRY—AMENDATORY ACT.

RUDKIN v. COOPER.

A desert land claimant who has made entry under the act of March 3, 1877, at any time during the life of his entry, and after the passage of the amendatory act of 1891, may elect to proceed under the latter act.

In case of a contest against an entry made under the act of 1877, where election to proceed under the act of 1891 is pleaded by way of special defense, it is incumbent upon the defendant to establish the facts necessary to sustain the plea.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ Sec. 20, T. 10 N., R. 22 E., North Yakima land district, Washington.

The record shows that John R. Cooper made desert land entry for the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of Sec. 20, T. 10 N., R. 22 E., and on June 3, 1892, relinquished the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of the above described entry.

John J. Rudkin filed affidavit of contest against the SW. $\frac{1}{4}$ of said entry March 27, 1893, alleging failure of defendant to comply with the law in reference to the reclamation of said land.

This case was tried before the local officers on May 11, 1893, and on May 23 following, they rendered their joint opinion directing the dismissal of the contest.

Upon appeal, your office decision of November 18, 1893, reversed the holding of the local officers, sustained the contest, and recommended the cancellation of the entry involved.

The facts in the case, as shown by the evidence, are admitted and are substantially as follows:

That the land, at the date of contest, was unreclaimed; no money had been expended nor any work done toward reclaiming it, and it was, at that time, grown up to sage brush.

That the defendant testified that at that time the main ditch of the Northern Pacific Yakima and Kittitas Irrigation company was completed to within a mile of the land in controversy, and that he had made arrangements with the company to let him have enough water to irrigate the land.

That the register had informed him in the spring of 1892 that he had four years within which to prove up and that he gave notice that he would prove up under the act of 1891, instead of that of 1877 under which he made his entry.

It will be noticed that this entry had been in existence under the old law for eighteen months when the new act was passed, and that the three years allowed from date of entry, within which he was required to reclaim the land, would have expired on June 4, 1892, and it was his privilege at any time during the existence of his entry, and subsequent to the passage of the amendatory act of 1891, to elect to proceed under it.

The act of March 3, 1877 (19 Stat., 377), does not require any yearly expenditure, but, under that act, it was sufficient if the tract so entered as desert land, was reclaimed by conducting water upon it within the period of three years thereafter.

In the act of March 3, 1891 (26 Stat., 1095), it was required by the terms of the statute that an expenditure of one dollar per acre each year should be shown until the full amount of \$3 per acre had been expended in the reclamation of the land.

The scope of the amendatory act has been considered in the case of Andrew J. Clayburg, recently decided by the Department (20 L. D. 111). It was there held that the decision of the Commissioner of the General Land Office, rejecting yearly proofs, is an interlocutory order from which no appeal lies to the Department; but it was further held that this rule applied only to *ex parte* cases.

In the case at bar the appeal, therefore, properly lies, as it is a contested case, and it follows that your decision passes upon the merit of the causes of the parties litigant, and if not appealed from would determine finally the questions affecting the validity of the entry.

In the evidence contestee states that he gave notice to the register that he would proceed under the act of March 3, 1891. But it does not appear what this notice was. In the case of Poyntz v. Kingsberry (19 L. D., 231), it was held (syllabus) that:

The right of an entryman under the desert land act of 1877, who is in default thereunder, to take advantage of the additional time granted by the amendatory act of March 3, 1891, can not be recognized, if his intention to take such action is not formally asserted prior to the intervention of adverse rights.

The Department in passing upon the question of what constituted a sufficient notice of intention to prove up under the amendatory act, held, in John W. Herbert (17 L. D., 398), that the entryman

will be required to file in the local office a sworn statement of his intention to proceed under said act showing what has been done by him in regard to the land, and that since his determination to take advantage of the act in question he has complied with the provisions thereof as far as possible.

The general rule is that the contestant must establish those facts which are necessary to sustain the charge contained in the affidavit of contest. But the charge here, primarily, was a failure to reclaim, during the time provided by the act of 1877. This seems to be well established by the evidence. When the defendant entered a special plea that he had elected to proceed under the amendatory act of 1891, it then became his duty to establish those facts that were necessary to sustain his special plea. He should have shown that he had formally elected to proceed, under the latter act as set forth in the Herbert case. This he failed to do, and it follows that the decision appealed from was not in error and the same is hereby affirmed.

SURVEY—MONUMENTS—FIELD NOTES—COAL ENTRY.

DAVIS *v.* TANNER ET AL.

In running lines of a survey where the monuments called for are on the ground, and there is found to be a variation between the calls in the field notes, and the monuments, the latter must control; in the absence of monuments the surveyor must be guided by the field notes.

A coal entry cannot be allowed in the absence of evidence showing the existence of merchantable coal within the boundaries of the tract in question.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (P. J. C.)

The land involved in this appeal is the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 31 S., R. 65 W. Pueblo, Colorado, land district.

The record shows that John Tanner filed his coal declaratory statement, under section 2348, Revised Statutes, for the purchase of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ in said section, township and range, November 7, 1888, alleging possession from August 29 preceding.

On August 15, 1889, John N. Davis made homestead entry of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section, township and range.

On December 28, 1889, Tanner made application to purchase the land included in his said declaratory statement, and on December 31, following final entry was made by James Vaughn, attorney in fact, and certificate issued. This application was sworn to by Tanner December 7, 1889, in De Kalb county, Missouri.

I find in the record a "certificate" from the register of the local office, in which he certifies that Tanner filed "a coal application to purchase," and tendered the purchase money October 3, 1889; "that on December 28, 1889, the within application of John Tanner, being subscribed and re-sworn to December 24, 1889, was received with purchase money," etc.; that Davis was notified of Tanner's application October 31, 1889. I do not find in the files any other record of any such transactions.

It seems that your office, by letter of September 19, 1890, held the Davis entry for cancellation, from which he appealed, and by departmental decision of January 20, 1892 (L. & R. No. 233, p. 499) a hearing was ordered to determine (1) the character of the land in dispute, and (2) the good faith of the coal entry made in the name of Tanner.

Hearing was accordingly had before the local officers, and as a result they decided in favor of the coal applicant, and recommended the cancellation of Davis' homestead entry. On appeal, your office, by letter of July 7, 1893, affirmed their action, whereupon he prosecutes this appeal, assigning numerous grounds of error both of law and fact.

The only issue here is as to the character of the land, the question as to the good faith of the defendant having been abandoned. The determination of this question rests wholly upon the correctness of the

surveys, on the ground that have been submitted, because, if the survey sought to be established by the defendant be accepted, then it is shown that the "Davis forty," so-called, is most valuable for coal, while if that claimed by Davis to be correct is adopted, then it is clear there is but little, if any, practical value in the land for the coal therein.

I am clearly of the opinion that the theory of the defendant in locating the lines on the ground is not warranted by the facts as I understand them from the testimony.

It is conceded that many of the section and quarter-section corners in the vicinity of the land were missing, but all of the section corners on the east side of the township—on the 8th guide meridian—are in place. It is claimed by the defendant's surveyors that they have located the quarter section corner between sections 13 and 24, and also the section corner common to sections 11, 12, 13 and 14. Now from these two points they survey the section and tie it to the northeast and southeast corners thereof, which are admitted to be in place. The surveyor who did the work swears that—"From the corner common to sections 11, 12, 13 and 14 we ran So. one mile, on a variation of $13^{\circ} 30''$, and found no corner; thence east on a variation of $13^{\circ} 30''$ 40 chains we located a corner." "By continuing on the So. line of section 13, from the quarter corner, and running east on a variation of $13^{\circ} 30'$ forty chains that point would be 490 feet north of the corner common to Secs. 13, 24, 18 and 19 on the guide line." He did not actually run the line from the southwest to the southeast corner of section 13, because "the country is so bad that it would be difficult to check back, but by starting from the southeast corner of Sec. 13, and running west 40 chains on the same variation, by actual measurement this point would bring you south of the quarter corner 490 feet." This means, as I read it together with his drawing, that if he had run the south line from the southeast corner, according to the calls of the field notes the quarter corner between sections 24 and 13, being also the southwest corner of the land in dispute, would have been 490 feet south of where he did place it, and it follows of course, that the north line would also have been that distance south. But instead of thus running his lines he arbitrarily deflected the line from the southeast corner of section 13 north, to reach what he says is the quarter corner between sections 13 and 24.

It is conceded that the rule is in running lines of a survey where the monuments called for are on the ground, and there is found to be a variation between the calls in the field notes and the monuments, the latter must control, but in the absence of monuments the surveyor must be guided by the calls in the field notes. There is an attempt made to show that the corner common to sections 11, 12, 13 and 14, and the quarter corner between sections 24 and 13 are or were at the points indicated by the defendant's surveyors. But the testimony is wholly insufficient for that purpose. No witnesses testify positively that these corners were ever established at these points; they are not at the points

indicated by the field notes. The official plats on file in your office show only a slight deflection from a due course in the east and west lines, the lines being practically straight.

But aside from this, I do not think the defendants, under their own testimony, have made a sufficient showing in the face of the official survey to warrant the acceptance of their plats. The surveyor for the company says that he knows the southeast corner stone of section 16, in the same township and range. If that be true, and I have no reason to doubt it, then it would have been a comparatively easy matter under the rules for the restoration of lost or obliterated corners of March 13, 1883, and June 2, 1887, to have re-established the corners, or, at least, ascertained the proper location therefor. But no attempt was made to connect this corner with the southeast corner of section 13. He says that upon "information" he believes the course and distance from the southeast corner of 16 check with southwest corner of the Davis 40, as indicated by his plat, but he did not ascertain by actual work in the field whether this is true or not.

The survey of the defendant, therefore, must be rejected, and that offered by the contestant, being in conformity with the official survey and field notes, will, for the purposes of this case, be accepted as the true one.

Fixing the boundaries thus, it only remains to ascertain whether there is coal upon the Davis forty. It is conceded that none has ever been mined for marketing. There is an outcrop in the extreme northwest corner of the forty, but no mine has been opened on the same, and it is shown by a fair preponderance of the testimony that, granting the vein to be continuous, merchantable coal could not be found within the lines of the land in controversy. The land is of but little value for agricultural purposes, but it is shown to be fairly good for grazing.

As I understand your office opinion, it is based entirely upon the theory that the survey of the defendant is the correct one, and that it was on this theory that your office judgment in favor of the defendant is based, thus practically conceding that if not correct, coal does not exist on the land.

The judgment of your office is therefore reversed, and Davis' entry will remain intact, subject to compliance with the homestead law.

JONATHAN GANT.

Motion for review of departmental decision of November 30, 1894, 19 L. D., 383, denied by Secretary Smith, March 19, 1895.

PRACTICE—ATTORNEY—APPEARANCE—CONTINUANCE.

BRIM *v.* BARBER'S HEIRS.

A motion for a continuance in order that evidence may be secured to show that the appearance of the attorney for the opposite party is not authorized, is addressed to the sound discretion of the local officers, and their action thereon should not be disturbed unless it clearly appears that there has been an abuse of this discretion.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (E. M. R.)

This case involves lots 4 and 5 and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 24 S., R. 40 W., Garden City land district, Kansas.

May 18, 1885, Jonathan T. Barber made homestead entry for the above described tract.

January 9, 1888, Andrew J. Brim filed his affidavit of contest, alleging that defendant had abandoned the tract, and that it was not settled upon and cultivated as required by law.

At the hearing ordered the local officers on September 11, 1888, rendered their decision sustaining the contest and recommending the cancellation of the entry.

September 5, 1890, that decision was overruled by your office and no appeal was filed; thus ending the case.

Subsequently, on the 21st day of May, 1892, Brim re-attacked the entry in an affidavit of contest.

Upon this second affidavit, the case was set for hearing August 26, 1892, when the plaintiff filed an application for continuance in order that he might make service by publication on several non-resident defendants, as heirs of the deceased entryman. On the same day an attorney appeared and entered a general appearance for "all the heirs-defendants" and announced himself "ready for trial." The plaintiff then moved for a continuance "for forty-eight hours in which time to show by the testimony that G. L. Miller was not the duly authorized attorney for all the heirs."

This motion was overruled.

On the same day, the plaintiff not being present, the case was dismissed for default.

September 15, 1892, plaintiff filed a motion before the local officers, asking that the default be set aside and the case be re-instated. This was denied and the plaintiff appealed.

December 18, 1892, your office decision was rendered wherein it was held that the local officers were in error in refusing to continue the case on motion of the plaintiff; but after doing so your office decision appealed from, took into consideration the former case of Barber *v.* Brim, and held that the present contest was substantially the same as

that passed upon in the former case, and for this reason refused to order a hearing overruling the objection to accept the final proof of the entry-man.

It appears from an examination of the record that this case has been misapprehended from its inception.

The only question pertinent to the disposition of this case is the action of your office of December 18, 1892, wherein you held that the local officers were in error in refusing to continue the case on motion of plaintiff in order that he might show that Attorney Miller was not authorized to appear for all the heirs. This was a matter resting within the sound discretion of the local officers and should not have been disturbed by your office unless it clearly appeared that there had been an abuse of this discretion. "Usually an appearance by an attorney will be presumed to have been made with authority. (Am. and Eng. Encyclopædia of Law, Vol. I, page 184.)

There was no error on the part of the local officers in refusing to continue this case. As it was jurisdictional it could be raised at any time and the movant had no right to insist upon its consideration at this time, and that the case should be continued in order that he might prove that which he could raise at his will thereafter.

The case was therefore properly dismissed for default, by the local officers, the plaintiff being absent, and was improperly re-opened by your office. The subsequent proceedings held in this case therefore need not be considered.

For the reasons stated the application of Brim to contest is dismissed and the disposition made of the case by your office is affirmed.

There is contained in the record an application to perfect the proof of Jonathan T. Barber, deceased, made on February 20, 1893, by Evelyn T. Barber, one of the heirs. It is returned to you for such action as may be deemed advisable, and in the event that it is found to have been offered after the expiration of the seven years provided in such cases, it will be referred to the board of equitable adjudication.

SMUGGLER MINING CO. ET AL. *v.* TRUEWORTHY LODE CLAIM ET AL.

Motion for review of departmental decision of November 30, 1894, 19 L. D., 356, denied by Secretary Smith, March 19, 1895.

PRE-EMPTION—FINAL PROOF—ADVERSE CLAIM.

MULLIGAN v. STALTER.

In computing the time within which pre-emption final proof should be made the period elapsing between the rejection of the settler's filing, and the notice of its final allowance should be deducted.

The right of a pre-emptor, who is in default in the matter of making final proof, to transmute his claim cannot be defeated by an intervening entry based on preliminary papers executed while the land is not subject to appropriation.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (C. W. P.)

I have considered the case of Thomas Mulligan against Albert R. Stalter, in which Stalter appeals from the decision of your office of March 8, 1893, allowing Mulligan's application to transmute his pre-emption filing to a homestead entry, and holding for cancellation Stalter's homestead entry No. 15915.

The land in dispute is the NW. $\frac{1}{4}$ of section 21, T. 2 S., R. 67 W., Denver land district, Colorado.

From the record, it appears that on June 29, 1886, Thomas Mulligan made application to file a pre-emption declaratory statement for said tract, alleging settlement April 12, 1886, which was denied by the local officers because, as they claimed, it was railroad land. Mulligan appealed to your office. September 6, 1886, your office reversed the decision of the local officers. The Union Pacific Railway Company, which claimed the land, appealed to the Department. July 24, 1888, the Department affirmed the judgment of your office. August 16, 1888, your office notified the local officers of the rejection of the railroad company's claim, and the right of Mulligan to file pre-emption declaratory statement. October 9, 1888, the local officers notified the attorneys of Mulligan. November 14, 1888, Mulligan filed the declaratory statement which had been improperly refused by the local officers.

May 15, 1891, Stalter applied to make homestead entry of said land, which was rejected by the local officers, because the land was covered by the entry of Mary E. Stark, and the filing of Mulligan. Mary E. Stark had made homestead entry of said tract February 18, 1890.

May 26, 1891, Stalter filed affidavit of contest against Miss Stark's entry, and June 4, 1891, he filed a relinquishment of said entry. His homestead entry was then placed of record in the local office.

June 6, 1891, Mulligan made application to submit final proof under his declaratory statement, and August 15, 1891, was set as the date therefor.

August 14, 1891, Mulligan filed an application to transmute his pre-emption filing into a homestead.

After a variety of proceedings, and several appeals, the local officers were directed by your office to order a hearing.

A hearing was thereupon had on the 29th day of April, 1892. The local officers recommended that the application of Mulligan to transmute his pre-emption filing into a homestead, be rejected, and the entry of Stalter allowed to remain intact. Mulligan appealed to your office.

The land is unoffered land, and the pre-emptor is entitled to thirty-three months from the date of settlement within which to make proof.

Mulligan in his declaratory statement alleges that he made settlement April 12, 1886, and it is contended by Stalter that he was only entitled to thirty-three months from April 12, 1886, when he alleged settlement, to make final proof.

A settler under the pre-emption law is not always bound by the date of settlement alleged in his declaratory statement; for the date of settlement is a matter of proof, and is not only a question of fact, but one of mixed law and fact. It is true Mulligan alleged settlement on April 12, 1886, but his declaratory statement having been denied by the local officers, it was not possible for him to perform the requirements of the law. He could not file his declaratory statement until the decision of the local officers had been reversed by this Department, and he had received notice of the decision. He continued to reside upon the land with an intention to claim it, and clearly in calculating the time within which he was required to offer final proof, the period which elapsed between the date of the rejection of his declaratory statement by the local officers and the date of notice of the departmental decision of July 24, 1888; viz: from June 29, 1886, to October 9, 1888, should be deducted. This being so, it follows that the time to make proof would have expired on the 22d of April, 1891. But he did not make application to make final proof until June 6, 1891.

From the foregoing it appears that after the 22d of April, 1891, this tract was subject to appropriation by the next settler in order of time who had complied with the conditions of the law, and inasmuch as Mulligan had complied with the law in all respects, save in submitting his final proof within the time provided for, such technical failure could only be taken advantage of and his entry could only be defeated by an applicant who had himself fully complied with the law in all respects, and whose application was free from all irregularity and defect.

As stated by you in the decision of your office, "there are no equities in the case in favor of Stalter," and as the grounds relied upon by him to defeat the entry of Mulligan are purely technical—which would not be sufficient to prevent Mulligan from now making proof as between him and the government—the entry of Stalter must be free from all technicality to accord to him a right superior to Mulligan.

It appears that the entry of Stalter was allowed on June 4, 1891, upon a homestead application, affidavit, and non-mineral affidavit, made on May 15, 1891, while the homestead entry of Mary Stark was intact upon the land.

Stalter testified that he did not appear at the land office on that day, and did not know of the allowance of his application to make entry, until he received the receipt, but had he so appeared, he should not have been permitted to make entry upon the presentation of the papers executed at the time when the land was not subject to entry, but should have been required to make a new affidavit, showing that at that date he was fully qualified to make homestead entry of the tract. *Hiram Campbell*, 5 C. L. O., 21; *Johnson Barker*, 1 L. D., 164; *Staab v. Smith*, 3 L. D., 320; *Holmes v. Hockett*, 14 L. D., 127.

His application was improperly allowed, and although such irregularity might have been cured, in the absence of any intervening adverse claim, Mulligan could take advantage of it, and having filed his intention within two days after the allowance of the entry to make proof upon the land, and before the irregularity was cured, he should now be permitted to perfect his entry.

The decision of your office is affirmed.

RAILROAD LAND—SECTION 5, ACT OF MARCH 3, 1887.

HOLTON ET AL. *v.* RUTLEDGE.

A settlement claim acquired after the passage of the act of March 3, 1887, and subsequent to the sale of the land by the railroad company, will not defeat the right of the purchaser, or his transferee, to perfect title under the provisions of section 5, of said act.

A purchaser of the standing pine timber, on land excepted from a railroad grant, is entitled to protect the interest thus acquired in the land under the provisions of said section, if the timber constitutes the chief value of the freehold.

A transferee claiming the right to perfect title under the terms of said section must show that the purchase from the company was made in good faith.

The right of a *bona fide* transferee to perfect title under said section is not affected by the fact that his purchase was made after the passage of said act, if the original purchase was made in good faith.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (C. W. P.)

I have considered the case of James M. Holton and John Schafer against Edward Rutledge, involving certain lands in the Ashland land district, in the State of Wisconsin, on appeal of John Schafer from your office decision of March 29, 1893, and of James M. Holton from your office decision of April 4, 1893.

The lands in dispute are within the fifteen miles, or indemnity limits of the grant of June 3, 1856, (11 Stat., 20), for the benefit of what is now known as the Chicago, St. Paul, Minneapolis and Omaha Railway, (Bayfield branch) and within the ten miles limits of the grant under the act of May 5, 1864, (13 Stat., 66) for the Wisconsin Central Railroad Company.

Under the rulings of the Department, the reservation under the act of June 3, 1856, served to defeat the grant for the Wisconsin Central.

The tracts were selected July 12, 1887, by the Omaha Company, list No. 1, but upon the adjustment of the grant for the company, the selection was cancelled, and the tracts restored to the public domain January 8, 1891.

Thus this land, though within the grant, was excepted from it, and therefore comes within the fifth section of the act of March 3, 1887. *Swineford v. Piper* (19 L. D., 9).

It appears that on February 17, 1885, the Chicago, St. Paul, Minneapolis and Omaha Railway Company conveyed the lands in dispute, with other lands, to Henry F. Spencer, which lands are described in your office decision of March 29, 1893. October 15, 1887, Spencer sold Rutledge all the pine timber standing on the tracts in question, with the right to remove the timber during the period of fifteen years.

On the 13th of December, 1892, Spencer conveyed to Rutledge, by quit-claim deed, these lands, with the exception of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 13, T. 46 N., R. 5 W.

March 4, 1891, Rutledge made application to purchase, under the fifth section of the act of March 3, 1887, (24 Stat., 556.)

The register and receiver at Ashland rejected said application on the ground that Rutledge had only purchased the pine timber standing on the tracts. Rutledge appealed to your office, which reversed the action of the local officers.

October 25, 1892, John Schafer made application to enter under the homestead law, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 11, T. 45 N., R. 5 W., being part of said tracts, and March 2, 1893, James M. Holton made application to enter under the homestead law, the NW. $\frac{1}{4}$ of section 1, T. 46 N., R. 5 W., also part of said tracts.

These applications were both rejected because of Rutledge's preceding application. Schafer and Holton appealed to your office, which affirmed the judgment of the local officers. Schafer and Holton have appealed to the Department.

The applications of Schafer and Holton, during the pendency of Rutledge's appeal, were properly rejected. *Hamilton v. Harris* (16 L. D., 288); *Idem*, on review, (18 L. D., 45).

The sale of the standing timber by Spencer to Rutledge, irrespective of the quit-claim deed, was the sale of an interest in the land, and entitled him to acquire the entire title by paying the government price therefor, as provided by section 5 of the act of March 3, 1887, provided the standing timber constituted the real value of the freehold (*Telford v. Keystone Lumber Co.* (18 L. D., 176), if Rutledge and Spencer both purchased in good faith, unless the claims of Schafer and Holton are tenable. But neither of them claim to have made any settlement before the year 1892, long after the passage of the act, and long after Spencer had purchased the tracts from the railroad company, and, consequently, would not prevent Spencer, or his transferee, from purchasing from the

government. *Telford v. Keystone Lumber Co.*, *supra*; *McCord v. Rowley* (18 L. D., 502); *Chicago, St. Paul, Minneapolis and Omaha Railway Company* (11 L. D., 607).

The evidence shows that the timber comprised the paramount interest in the freehold; the good faith of Rutledge is not questioned; but it is alleged that the purchase from the railroad company by Spencer was not in good faith.

Rutledge, in his application to purchase, alleges that the tracts were purchased by Spencer

bona fide and in entire good faith and for a valuable consideration, and upon the understanding and belief that the same were a part of and included within the lands granted to the said railroad company, and that said railroad company was the lawful owner of the title thereto, under the laws of the United States, and of the State of Wisconsin.

But there is nothing in the evidence to sustain the allegation that Spencer was a *bona fide* purchaser.

The eighth clause of the general circular of February 13, 1889 (8 L. D., 348), requires that the proof on the part of the applicant to purchase should show that he, or one under whom he claims, was a *bona fide* purchaser of the land from the company.

In *Union Pacific Railway Company v. McKinley* (14 L. D., 237), it is said the

fifth section of this act was intended to protect *bona fide* purchasers from the railroad company—that is, parties claiming title through the grant to the company. It was a provision through which the title so obtained could be perfected. The right to purchase from the government depended upon a purchase in good faith from the company, and only those who had so purchased could avail themselves of this remedy.

And in *Sethman v. Clise* (17 L. D., 307), it is said—

It can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of the approval of the act, if it was originally purchased in good faith from the company.

The circumstance that Rutledge purchased after the passage of the act of March 3, 1887, does not deprive him of the right to purchase from the government, if the land was originally purchased in good faith from the railroad company. *Sethman v. Clise*, *supra*; and *Swineford v. Piper*, *supra*.

I am therefore of opinion that Rutledge should be allowed to purchase the entire tract, which he has applied to purchase, if he offers sufficient proof of Spencer's good faith.

The judgment of your office is accordingly affirmed, with the above modifications.

PRE-EMPTION—TECHNICAL SUB-DIVISIONS—CONTIGUITY.

WILDMAN v. MONTGOMERY.

A patent in which the land is described in accordance with the sub-divisions shown on the official plat conveys all the land within the limits so specified, whether the quantity of said land supposed to be contained therein is correctly stated in the patent or not.

The rule now followed, with respect to the non-contiguity of tracts lying on both sides of a meandered slough, will not be applied to a tract surveyed and entered under a practice that authorized a sub-division of such description and the entry thereof.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (J. L.)

In this case John W. Wildman has appealed from your office decision of October 3, 1893, dismissing his protest against James T. Montgomery's pre-emption final proof and cash entry of "the part of Long Island in the NW. $\frac{1}{4}$ of section 10, T. 13 N., R. 5 W., containing eight acres of land", in Grand Island land district, Nebraska.

On October 7, 1889, Montgomery filed his pre-emption declaratory statement, No. 9495, for said land, alleging settlement on October 4, 1889. On October 3, 1892, he offered final proof. Wildman appeared and made protest in writing; introduced three witnesses, and put in evidence his patent from the United States of America, bearing date March 10, 1885, and granting to him:

The north half of the north-west quarter of section ten, in township thirteen north, of range five west of the sixth principal meridian in Nebraska, containing forty-five acres and ten hundredths of an acre, according to the official plat of the survey of the said land, returned to the General Land Office, by the surveyor-general.

On October 4, 1892, the receiver transmitted to your office for consideration and action, Montgomery's final proof (approved by the receiver) and Wildman's protest and the evidence.

On October 3, 1893, your office, for reasons stated, dismissed Wildman's protest, and retained Montgomery's final proof, subject to Wildman's right of appeal.

Wildman has appealed to this Department.

Wildman's protest and appeal, and the proofs, present for my determination two questions:

1. Whether Wildman's patent does, or does not, include the parcel of 8.20 acres of land claimed by Montgomery as pre-emptor.
2. Whether Montgomery did make settlement and improvements, and establish and maintain residence upon the parcel of 8.20 acres of land described in his declaratory statement.

The facts are as follows:

The township was surveyed in September, 1862, and the official map thereof, approved by the surveyor-general, was returned to the General Land Office on March 26, 1863. Platte River runs north-east across

67N 424
32WS. 186

the north-west corner of the township. The average width of the river between its right and left banks, as measured across many channels and intervening islands, is about one mile and three quarters of a mile. The surveyors, in their field notes, reported:

That the river runs through this township in level channels, the most of which are wide and shallow, and can be chained across at almost any point with accuracy. The bed of the river is sandy and moveable. The channels change frequently.

Across the north-west corner of section 10, in the year 1862, there was a slough, cut by the waters of Platte River, averaging about twelve chains wide, and so shallow that the surveyors chained across it on both the west and north lines of the north-west quarter of said section. The surveyors assumed the southern edge of this slough to be the south or right bank of the river, and meandered it. They also meandered the northern bank of said slough along the south edge of Long Island, in such manner as to show that part of the slough to be a quadrilateral figure bounded by straight geometrical lines, and to cover 27.60 acres of land, of which 26.70 acres lay within the north half of the north-west quarter of section 10, and 90 hundredths of one acre lay within the south half of said north-west quarter section. They sub-divided the fractional NW. $\frac{1}{4}$ of section 10 into three lots. Lots 2 and 3, containing together 79.10 acres, composed the south half of said quarter section. Lot one, containing 53.30 acres of land,—lying in two parts or parcels on opposite sides of said slough, one of 45.10 acres on the main land, and the other of 8.20 acres on Long Island,—composed the fractional north half of said quarter section.

The surveyors also reported that the 8.20 acres of land on Long Island were swampy and the soil third rate.

It appears by a rough plat of the premises, filed with the testimony, authenticated by three witnesses, and not questioned, that since the year 1862, the right bank of the river has been advanced southwardly; that the slough which averaged about twelve chains in width, has been divided into two narrower sloughs or channels; and that between them, and between the 8.20 acre parcel of land on Long Island and the main land, there has been deposited and built up a new island, which is apparently larger than Long Island, and extends north-east and south-west from a point near the middle line of section 9, across section 10, and some distance into section 3. The 8.20 acre parcel on Long Island has not been disturbed.

The testimony does not show in what year, or during what flood, the change in the topography took place. It must, however, have occurred before Montgomery filed his declaratory statement, or made his settlement in October, 1889; because Montgomery built his first house on the new island in section 9, outside of Wildman's wire fence, and built his second house about one year afterwards, on the new island, in section 10; and inside of Wildman's fence, which he was obliged to cut for the purpose. Montgomery never did make any settlement, build any house,

or establish residence on the 8.20 acres of swampy land lying north-west of the slough on Long Island in section 10, and described in his declaratory statement.

On July 3, 1879, Wildman owned as a homesteader the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 10, containing eighty acres. Under the act of March 3, 1879 (20 Statutes, 472), he was entitled to make additional homestead entry of eighty acres more. He applied to "enter the fractional N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 10, T. 13 N., R. 5 W., containing 45.10/100 acres, as additional", etc., etc.

On July 7, 1884, he claimed in his affidavit, and was permitted to make final proof for, the "N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 10, T. 13 N., R. 5 W.", without specifying quantity.

On July 17, 1884, the register issued final certificate for "the north $\frac{1}{2}$ of the north-west $\frac{1}{4}$ of section 10, in township No. 13 N., of range No. 5, west of the 6th principal meridian in Nebraska, containing 45 and 10/100 acres."

On March 10, 1885, patent was issued, following the terms of the final certificate, and as hereinbefore quoted, in the second paragraph.

I am clearly of opinion that Wildman's patent conveyed to him the whole of the north half of the north-west quarter of section 10 aforesaid, including the 8.20 acres on Long Island, and that said last mentioned parcel of land, described by Montgomery in his declaratory statement, has passed beyond the jurisdiction of executive officers.

The Land Department can dispose of public lands only in accordance with legal subdivisions as ascertained and shown by approved plats of surveys filed in the General Land Office. In the case of Edward N. Marsh (5 L. D., 96-99), referred to in your office decision, the acting Secretary held that—

As Cusey only purchased and paid for 59.51 acres, embraced in a legal subdivision shown by the government survey, his patent cannot be held to convey to him a greater quantity, etc., etc.

In the case of *Gazzam v. Phillips*, (20 Howard, 372-375) overruling the case of *Brown v. Clements* (3 Howard, 650), the supreme court of the United States rested its decision as to the rights of parties claiming under patents to Etheridge and Stone, respectively, expressly upon the ground that—

The sales in each case were made in conformity with the subdivisions, as marked upon the plat of the surveyor-general, then on file in the office, and to which all purchasers of the public lands had access, and which constituted the guide of the register and receiver in making the sales.

In the case now under consideration, there was not on the official plat of section 10 aforesaid, any legal subdivision containing 45.10 acres of land, nor any legal subdivision containing 8.20 acres of land. The north-west quarter of section 10, which was only made fractional by the meandering of the slough aforesaid, contained but three subdivisions, numbered 1, 2, 3, as hereinbefore stated. The land of which

Wildman sought to make additional homestead entry, might have been rightly described, either as "lot 1 of section 10," or as the "fractional north half of the NW. $\frac{1}{4}$ of section 10." Under either description, he would have taken all the land in the north half of the NW. $\frac{1}{4}$ of section 10, except what was covered by the waters of the meandered slough. The description in the patent closes all controversy, and conveys all the land within the limits specified, whether the quantity of land supposed to be contained therein was correctly stated or not.

In 1862, when the survey was made, and in 1879, when Wildman made his additional homestead entry, there was no law, regulation, usage or practice which required the surveyors, or the entryman, or the local officers, to consider the meandered slough aforesaid, as obstructing the contiguity of the parcels of land lying on Long Island, and on the main land, respectively. The rule on that subject now recognized and enforced, was first promulgated by the Commissioner of the General Land Office on September 22, 1883, in letter "G," of that date, addressed to the register and receiver, McCook land district, Nebraska, in the case of Benjamin Bird. (See Letters, Vol. 175, p. 295; also the cases of Olof Landgren, 11 C. L. O., 255; James Shanley, 5 L. D., 641; Matilda Strohl, 8 L. D., 62, and Mathias Ebert, 14 L. D., 589). It follows, therefore, that the NW. $\frac{1}{4}$ of section 10 was legally subdivided, and that Wildman's application to enter the fractional north half of said quarter section, was regular and proper. The error in naming the quantity of land embraced within the limits applied for, was immaterial. The official plat on file is the best and the conclusive evidence about that.

For the reasons above indicated, your office decision of October 3, 1893, is hereby reversed. Montgomery's pre-emption declaratory statement is hereby cancelled. And you will cause proper notations to be made upon the records and plats, to show that the whole of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 10 aforesaid has been patented, and is no longer subject to entry or settlement.

HOMESTEAD ENTRY—SINGLE WOMAN—HEAD OF FAMILY.

NEWELL *v.* PETEFISH.

During the period accorded a successful contestant for the exercise of his preferred right of entry the land subject thereto should be reserved from all other appropriation.

A woman who states in her preliminary affidavit that she is the head of a family, a single person, and a native born citizen, fulfills the personal qualifications required of a homesteader, and should not be required to make an additional statement as to her age.

It appearing by official certificate that the homestead applicant has by judicial proceedings under the laws of the State, adopted a child, and so become the head of a family, and thus qualified to make homestead entry, the Department will not question the validity of said judicial proceedings.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (J. L.)

I have considered the appeal of Hugh Petefish from your office decision of July 3, 1893, reversing the decision of the local officers, rejecting the application of Edith M. Newell to make homestead entry of the NE. $\frac{1}{4}$ of section 30, T. 18 S., R. 31 W., Wa-kee-ny land district, Kansas; and holding for cancellation Petefish's homestead entry for said tract of land.

Edith M. Newell contested the timber culture entry of one Noah J. Beaman for said tract. Said timber culture entry was canceled by your office on March 8, 1893; and on the records of the local office on March 13, 1893; and preference right of entry was awarded to Miss Newell as successful contestant, according to law. Notice of said cancellation and of her preference right was received by Miss Newell on March 17, 1893.

On March 24, 1893, one Hugh Petefish was permitted by the local officers to make homestead entry No. 23,314 of said tract of land. Said entry was improperly allowed, and must be held subject to Miss Newell's preference right of entry. (See *Allen v. Price*, 15 L. D., 424.)

On March 25, 1893, Edith M. Newell, in the exercise of her preference right aforesaid, tendered her application to make homestead entry of said tract of land; and in her homestead affidavit she made oath: "That I am the head of a family, and a single person, and a native born citizen of the United States." Instead of rejecting said application upon the ground that said tract was segregated by the entry of Petefish, which they had improperly allowed the day before, the local officers say:

That the claimant was required to file another affidavit showing more specifically her qualifications as the head of a family, and stating her age. On this March 31, the applicant filed her affidavit showing that she had adopted a child, and by such adoption claims the right to make entry as the head of a family. We do not consider that the applicant is the head of a family within the meaning and intent of the homestead law. Her application is therefore rejected.

Miss Newell appealed. And on July 3, 1893, your office—

Reversed said decision, and held Petefish's entry for cancellation. But your office proceeded to direct that Petefish's entry be canceled on Miss Newell's perfecting her application, otherwise Petefish's entry to remain intact.

From your office decision Petefish has appealed to this Department.

Miss Newell by swearing in her homestead affidavit "that I am the head of a family, and a single person, (that is to say, an unmarried woman), and a native born citizen of the United States," fulfilled the personal qualifications of a homestead entryman. She did not choose to state her age. Admitting that the local officers, if they had reasonable *bona fide* doubts as to the truth of her statements in respect to her headship of a family, or her condition as a *feme sole*, or her citizenship,

did have the right to require a more specific showing as to said allegations, it is plain that their requirement that she should also state her age, was irrelevant and impertinent.

Miss Newell's affidavit, dated March 29, and filed March 31, 1893, shows that in the month of October, 1892, when she was more than eighteen years old, in the probate court of Lane county, Kansas, she adopted a minor child as her own; and that said child has ever since resided with her and been supported by her.

The laws of Kansas enact:

(3868) *Minority*. Sec. 1. The period of minority extends, in males, to the age of twenty-one years, and in females to that of eighteen years.

(3873) *Adoption*. Sec. 6. Any person may appear in the probate court of the proper county, and offer to adopt any minor child or children as his or her own: *Provided*, Such minor, and his or her parents, if living and in the State, or guardian, if any, appear before such court and consent to the adoption; and if the probate court is satisfied that such consent is free and voluntary, the said court shall make its proceedings of record in the said probate court, declaring such minor child or children the child and heir of such person so adopting such minor; and then and thereafter such person so adopting such minor child shall be entitled to exercise any and all rights of a parent, and be subject to all the liabilities incident to that relation.

(3874) *Adopted child*. Sec. 7. Minor children adopted as aforesaid, shall assume the surname of the person by whom they are adopted, and shall be entitled to the same rights of person and property as children or heirs at law of the person thus adopting them.

(See General Statutes, Kansas, 1868, Chapter 67, Sections 1, 6 and 7, October 31.)

The official certificate of the probate judge of Lane county, Kansas, under his official seal, filed with this record, shows that on the third day of October, 1892, Edith M. Newell, in conformity with the statutes above quoted, in open probate court,

did adopt and take as her own child and heir one Henry Hailing, a minor child of about ten years of age; and that the record of said adoption is on record on page two volume one, adoption records of Lane county, Kansas.

The validity of said proceedings in said court will not be inquired into by this Department.

Having thus lawfully provided herself with a male child to be her companion and helper during residence on her homestead, Miss Newell became the head of a family, and as such entitled to make homestead entry.

Your office decision is hereby affirmed.

TIMBER CULTURE ENTRY—COMMUTATION.

CAREY v. CURRY'S HEIRS.

The right to commute a timber culture entry may be recognized on behalf of the heirs, where the entryman, during his lifetime, has substantially complied with the law for the requisite period.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (I. D.)

The plaintiff in the case of George W. Carey v. the Heirs of Thomas Curry, deceased, appeals from your office decision of November 29, 1893, dismissing his contest against the timber-culture entry of Thos. Curry, deceased, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 23, T. 13 N., R. 18 E., Walla Walla series, North Yakima land district, Washington.

Without recounting the history of the several contests, appeals, and hearings between these parties from 1886 to the present contest, it is sufficient to state that the contest affidavit charges:

1. That for the past five years, neither the said Thomas Curry, nor any representative or agent of said Curry or his heirs, has complied in any manner or way with the timber-culture law, in connection with this said entry.

2. That the land embraced in said timber-culture entry is now practically unclaimed, neglected, unappropriated tract of public ground, it being unfenced, uncultivated, unirrigated and nearly covered with a native growth of sage brush; that said Thomas Curry is now dead, and has been dead for several months.

3. That during the lifetime of said Curry a partial attempt was made to secure a growth of timber on said land, but of the trees planted on said land by him several years ago, only thirty-one (31) remain alive on the tract, and these are wholly unprotected from stock and will in all probability die for want of water and attention, and are in a decaying condition now.

4. That the sons of the said Thomas Curry are and have been of sufficient age to comply with the requirements of the timber-culture law with respect to this land, if they desired to do so, but neither they nor their alleged representatives have done so.

After numerous delays and before service was secured in this contest, John M. Curry, one of the heirs of the deceased entryman, arrived at the age of twenty-one and gave notice December 23, 1891, of his intention to make proof and commutation for the land for himself and on behalf of the other heirs, including one minor, under the act of March 3, 1891 (26 Stat., 1095).

October 18, 1892, hearing was had on this contest, all parties being properly before the local officers.

The evidence shows that Thos. Curry built a house upon the land early in 1879 and lived in it, with his family, until his stroke of paralysis in September, 1883, during which time he broke five acres and planted it to trees within the required time, and planted five acres more the fourth year to seeds and cuttings, meantime having fenced and cultivated thirty acres; that he acted in entire good faith and fully com-

plied with the law until September, 1883, when he was stricken with paralysis, and from that time until he died in 1887 he was utterly helpless and speechless.

Upon his death he left three children too young to carry on the work on the land. His sons, as they arrived at a sufficient age to do so, went on the land, made it their home and continued to improve and cultivate it.

The first contest brought by this plaintiff against Thos. Curry, was during his lifetime, but after his paralytic stroke this Department held that he had practically complied with the law up to the date of contest in May, 1886, and that whatever of failure to fully do so "was due to the act of God." *Carey v. Curry* (7 L. D., 27).

Your office decision says:

The same reason for excusing any laches on the part of the entryman from September, 1883, when he was stricken with paralysis, to May 30, 1886, existed until August 26, 1887, when he died. A period of considerable over eight years had elapsed from date of entry, during which the entryman had substantially complied with the law. It also appears that on December 23, 1891, John M. Curry, one of the heirs of the deceased entryman, prior to legal service of notice of the second contest, filed application to make final proof under the fifth proviso of Sec. 1, act of March 3, 1891, which allows the entry to be commuted by a cash payment, upon a showing of compliance in good faith with the law for a period of four years.

The evidence sustains your office decision which is affirmed, the contest dismissed, and defendant's final proof will be allowed.

ISOLATED TRACT—PALATKA SCRIP.

W. C. BULLOCK.

An order directing the public sale of land as an isolated tract precludes the allowance of a Palatka scrip location thereof.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (I. D.)

Bullock appeals from your office decision of December 9, 1893, wherein his location of Palatka scrip on island No. 1, Sec. 24, T. 17 S., R. 23 E., containing 3.54 acres, Gainesville land district, Florida, is refused.

It appears that Bullock made application for the survey of this island which was approved on May 20, 1893, and the local land office was ordered to dispose of said island at public sale under the provisions of section 2455 of the Revised Statutes.

The local officers, by mistake, after the approval of the survey, gave notice of the filing of the plat of survey and that the land was subject to entry; thereupon Bullock sought to take the land by locating it with Palatka scrip, which he had purchased for that purpose.

The local officers rejected this application for the reason that the Department had ordered a disposal of the island, as a isolated tract, under said section 2455.

Said office decision says:

In view of the facts recited you are instructed to offer the tracts as directed by office letter "C" of May 20, 1893, at public sale after publication for thirty days in some newspaper of general circulation in the vicinity of the land according to the instructions contained in circular of January 18, 1851, (1 Lester, 350), Mr. Bullock paying the expense of publication.

Under the instructions of the Department the application to locate the land with scrip was properly rejected.

Your office decision is affirmed and the local officers will proceed to dispose of the tract as heretofore directed.

STRYKER ET AL. v. BRINKLEY.

Motion for review of departmental decision of December 13, 1894, 19 L. D., 503, denied by Secretary Smith, March 19, 1895.

TIMBER TRESPASS—RULE OF DAMAGES—HOMESTEAD.

ISADORE COHN.

In the settlement of an unintentional timber trespass the value of the timber at the time of its taking, or if it has been converted into another form, its then value, less what the labor and expense of the trespasser have added thereto, is the proper rule of damages.

The fact that the trespasser in such case, in order to avoid prosecution has offered a larger sum in settlement of the trespass, than that required under the rule adopted by the Department, is no reason why he should be held to such proposition, where it does not appear that he was acquainted with said rule.

It is not an act of trespass for a homesteader to remove timber from his land in the preparation of the same for cultivation, nor should his vendee be held liable on a proposition of settlement therefor.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 19, 1895. (G. C. R.)

With your office letter ("P") of November 5, 1894, you transmit the report and recommendation, dated August 16, 1894, submitted by Special Agent Dixon, in the matter of the timber cut by Isadore Cohn, of Sheridan, Nevada, from the E. $\frac{1}{2}$ of lot 8, of Sec. 6, and lot 11 of Sec. 5, T. 10 N., R. 20 E., California, shown to be vacant, unappropriated public lands; and from the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 34, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 11 N., R. 19 E., California, covered by homestead entry No. 6182, made March 8, 1893, by George P. Monroe.

The agent reported that both Cohn and the entryman, Monroe, had taken timber from the land (fir and pine), that the trespass was committed from September, 1889, to July 30, 1894, the timber hauled to Cohn's mill close by, and most of it manufactured into lumber and sold.

The agent on examination of the land reported 279,789 feet of lumber taken therefrom by Cohn, who admitted the trespass to that extent, "for the purpose of avoiding litigation," and offered to pay for the lumber at the rate of five dollars per thousand feet, together with expenses incident to the employment of a surveyor (\$11.00), amounting in all to \$1,409.94.

The agent recommended that this proposition be accepted, and your office is of opinion that "Mr. Cohn should be allowed to settle his liability by the payment of the sum offered by him."

I have very carefully considered the facts connected with this timber trespass. From statements made by Mr. Cohn and other witnesses, it can hardly be doubted that the timber cut from the vacant public lands, being said lots 8 and 11, was taken by mistake; indeed, one Boles testifies that as foreman for Cohn he caused the timber to be cut from these lands in the belief that they belonged to Cohn, who appears to have procured nearly all the surrounding patented lands, by mesne conveyances, from the patentee one D. R. Hawkins; that Cohn always cautioned him not to cut any timber which did not belong to him. It appears also that a plat of the township, certified by the county recorder to have been the official description thereof since 1887, and procured by the recorder from the land office, shows that at least a portion of said lots (8 and 11) was included in the lands patented to Hawkins; although the plat in that respect was erroneous, yet Cohn appears to have thought that his purchases included those vacant public tracts. His trespass was therefore not a wilful one; on the contrary, the timber was taken through inadvertence or mistake, and no blame can be rightfully attributed to Mr. Cohn.

The amount of timber so taken from said lots and converted into lumber at the mill was estimated by the agent at 204,911 feet. The value of the trees when standing was one dollar and fifty cents per thousand feet; on the ground when cut two dollars and fifty cents per thousand feet; at the mill six dollars and fifty cents; when manufactured fifteen dollars per thousand feet.

Under these facts, what is the measure of damages which should be exacted from the trespasser?

The case of *Wooden-Ware Company v. United States* (106 U. S., 432), was an action in the nature of trover, brought by the United States for the value of certain timber cut upon the public domain and then transported to the town of Depere. In discussing the rule of damages, which appears to have been the principal question in the case, the court held the rule to be as follows (syllabus):

1. Where he is a wilful trespasser, the full value of the property at the time and place of demand, or, if suit brought, with no deduction for his labor and expense.
2. Where he is an unintentional or mistaken trespasser or an innocent vendee from such trespasser, the value at the time of commission, less the amount which he and his vendor have added to its value.
3. Where he is a purchaser without notice of wrong from a wilful trespasser, the value at the time of such purchase.

In view of this decision, and on March 1, 1883 (1 L. D., 695), your office issued instructions to special timber agents, duly approved by this Department, relating to settlements for timber trespass, saying:

Where the trespasser is an unintentional or mistaken one, or an innocent purchaser from such trespasser, the value of the timber at the time when first taken by the trespasser, or if it has been converted into other material, its then value, less what the labor and expense of the trespasser and his vendee have added to its value, is the proper rule of damages.

The value of the property when first taken was one dollar and fifty cents per thousand feet. The wrong being unintentional, this value must govern. When the trespass was first discovered (and it was not known until the agent's discovery), the trees had been cut, hauled, converted into lumber, and mostly sold. Value had then been added to the timber by Mr. Cohn's work. This work consisted in felling the trees, hauling to the mill and sawing it into desired shapes. It was then worth fifteen dollars per thousand feet. The difference in the value when in the growing tree and that when converted into lumber represents the added value made by the work of Mr. Cohn and his employees.

The supreme court says, in the case cited, "he should be credited with this addition." If that be true, he should be allowed to settle with the government at the rate of one dollar and fifty cents per thousand feet. True, he agreed to pay the government five dollars per thousand, but this agreement was made after two or more of his propositions for settlement had been rejected by the agent. Even if he did propose to pay an amount for the timber above its real worth, I do not think he should be held to his proposition, as there is nothing in the record to show that he understood the rule for ascertaining his legal liability for the alleged trespass.

From the record in this case it is quite apparent that Cohn was very much alarmed when he found his employees had cut timber from the public lands, and his offer was, doubtless, made to avoid prosecution.

The land from which the timber was unintentionally taken was only lessened in value to that extent; and when the government receives the value of the timber so taken, it has its *quid pro quo*, and the law is satisfied; beyond this it should not go.

The amount so taken by Cohn from the unappropriated lands (said lots 8 and 11) was 204,911 feet, which at one dollar and fifty cents per thousand, amounts to \$307.36.

As to the trespass upon the land covered by Monroe's entry, a different question is involved. It will be noticed that he made entry for the land (the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 34, S. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 35, T. 11 N., R. 19 E.), March 8, 1893. The agent, under date of August 16, 1894, reported that Monroe lived in a tent upon the land for a short time in 1892, built a cabin—two rooms, size fourteen by twenty-four feet—the following spring, and resided on the claim "about one half the time," until April,

1894 (in all probably seven months); that he has a wife and four children; that the improvements are estimated at \$60; that between March 1, and July 30, 1894, Cohn removed to his mill thirty-one yellow pine and two fir trees, cut by the entryman on the land, making 74,879 feet; that this cutting was done for speculation and not in course of clearing for cultivation; that about April, 1894, the entryman moved away with his family, going to Nevada, where he is engaged in mining; that these acts are prima facie evidence of his intentions—i. e., to enter the land to speculate on the timber; that Cohn purchased the logs in exchange for clothing, provisions, etc.; that he had been advised by a lawyer that he would be justified in buying the timber of the entryman, if it was needful for the support of the latter's family.

Mr. Cohn states that Monroe, the entryman, came to him for provisions and clothes for his family, and offered to pay for the same with logs cut from the land covered by his entry; he let him have \$225 worth of these necessities; that Monroe was then living on the land, which is agricultural in quality.

By reason of the agent's report, your office on September 8, 1894, held Monroe's entry for cancellation. Subsequent to the agent's report, and on September 17, 1894, Monroe made a sworn statement to the effect that he made the entry in good faith to secure a home; that from date of entry to that time (September 17, 1894), he and his family continuously resided upon the land, used the same as a home, and cultivated a part of it, except that being a poor man, and the land not being in a condition to afford his entire support without expenditures of money, which he did not have, he was compelled to seek labor elsewhere, and on April 26, 1894, he and family temporarily left the land to seek work as a miner, about thirty miles from his home; that he worked there until September 8, 1894, when he and family returned to the land, voluntarily and uninfluenced by others; that when he left his homestead in April he left all his household effects in the house, except his bedding, a stove, and some dishes; that he now has a garden, forty by eighty feet, irrigated by a ditch, dug by him; also another garden, twenty by fifty feet, also irrigated; that he raised thereon in 1893 vegetables of different kinds; that his residence and chicken house cost him \$157; that he intends to continue to reside on the land and secure title thereto as a home; that he exchanged logs, cut from the land, with Mr. Cohn for lumber to build his house; that he also hauled logs to pay for provisions, clothing, etc., for himself and family, amounting to \$225; that these logs were removed in order to clear the land for agricultural purposes, and that his gardens "mainly occupy the space formerly occupied by said timber."

Accepting this showing as reflecting the facts, I do not think the law was violated in taking the timber from the land entered by Monroe. It has never been held that a homestead entryman, who makes his entry "for the purpose of actual settlement and cultivation," is debarred from

using the timber cut from the land he intends to cultivate in any manner he may desire; true, he should not be permitted to enter land and denude the same of its timber, unless by the use of the timber he improves the place, by building houses, making fences, etc.; and whenever it should appear that he is taking valuable timber from land not previously earned by compliance with law, and selling the same in the markets for his own gain, to the injury of the land entered, he should be called to an accounting; the government should be paid for the timber so taken, at the time and place of demand, whether in the hands of the trespasser or his vendee, and no deduction should be made for labor and expense.

Thirty-three trees, making 74,878 feet of lumber, which the agent reported as having been cut from Monroe's claim and manufactured in Cohn's mill, is not a large quantity, and I am inclined to accept as reasonable the statement made by the entryman that these trees were taken from land which was being prepared and intended by him for cultivation. That being true, the law was not violated; and, although Cohn, for reasons best known to himself, agreed to pay five dollars per thousand feet for this timber, he should not, under the facts disclosed, be held to his proposition.

Incident to the survey of this land, under direction of the agent, eleven dollars was expended; this sum, together with the sum found to be due for the timber taken from said lots 8 and 11 (\$307.36), in all \$318.36, is all that Mr. Cohn should be required to pay.

I can not, therefore, concur in your office recommendations. You will cause an immediate demand to be made for the sum above found to be due.

RAILROAD LAND—ACT OF SEPTEMBER 29, 1890.

ST. CLAIR *v.* BRANDENSTEIN ET AL.

A settler on railroad lands forfeited by the act of September 29, 1890, whose settlement was made prior to the passage of said act, and within an unimproved inclosure, including the tract in question and a large body of other lands, maintained by adverse claimants, has a preferred homestead right under section 2, of said act, as against the right of purchase, under section 3 thereof, on the part of said adverse claimants holding under a quit-claim deed from the railroad company.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (F. W. C.)

I have considered the appeal by Messrs. M. Brandenstein and L. Godchaux from your office decision of September 14, 1893, rejecting their application to purchase the SW. $\frac{1}{4}$, Sec. 21, T. 21 S., R. 10 E., M. D. M., San Francisco, California, under the provisions of the third section of the act of September 29, 1890 (26 Stat., 496), and permitting the homestead entry made by Thos. J. St. Clair for said land to remain intact upon the record and accepting his final proof tendered thereon.

This land is a part of that appertaining to the unconstructed portion of the main line of the Southern Pacific Railroad, the grant on account of which was forfeited by the act of September 29, 1890 (*supra*).

Instructions governing the disposition of these lands were given to the local office by your office letter "F" of June 2, 1892.

On July 11, 1892, Brandenstein and Godchaux applied to purchase the land before described under the provisions of section 3, of the act of September 29, 1890 (*supra*), and on January 10, 1893, gave notice of intention to offer proof in support thereof on February 28, 1893.

On August 1, 1892, St. Clair made homestead entry for this land and on December 15, 1892, published notice of his intention to offer final proof on February 28, 1893.

On the last named date all parties appeared and after the formal offer of proof the hearing was proceeded with.

Upon the testimony adduced the local officers found in favor of Brandenstein and Godchaux and recommended that the homestead entry by St. Clair be canceled.

Upon appeal your office decision of September 14, 1893, reversed that of the local officers and held in favor of St. Clair, as before stated.

An appeal brings the case before this Department.

The record made at the hearing discloses the following:

In 1871, Brandenstein and Godchaux, by purchase, came into the possession of a large body of land claimed under a private grant.

This land, together with other lands claimed through the State, and a number of odd-numbered sections within the limits of the railroad grant, were included within one large enclosure, embracing many thousand acres of land.

In 1873 Brandenstein and Godchaux applied to the Southern Pacific Railroad to purchase the odd-numbered sections within the limits of its grant that were also within its enclosure.

No action appears to have been taken by the company at the time upon said application.

In November, 1885, St. Clair entered this enclosure and settled upon the land in question, where he has since resided, and has the entire tract cultivated and improved, expending thereon several thousand dollars.

In December, 1885, he also applied to purchase of the company the land in question.

No action was taken upon said application until on March 12, 1888, he was advised by the company that other parties had applied to purchase this land, and for the purpose of determining to whom the company would quit-claim, he was ordered to appear before the office of the company.

At this time, it was well known that the road would not be built opposite this land, and the company while refusing to sell the lands in this vicinity, offered for sale its quit-claim, or abandonment of claim on account of its grant.

At the hearing before the company's office, the abandonment was made in favor of Brandenstein and Godchaux, who purchased the company's release as to the entire section at the rate of \$2.50 per acre.

It may be here stated that the record shows that after St. Clair entered and built his cabin upon the land in question, Brandenstein and Godchaux brought a suit in ejectment against him, upon which they secured a judgment for possession with costs, also that a suit brought under the act of February 25, 1885, to remove the fences enclosing this land was unsuccessful (*United States v. Brandenstein*, 32 Fed. Rep., 738).

Your office decision also states that on December 14, 1885, St. Clair applied at the local office to file pre-emption declaratory statement for the land in question; his application being denied for conflict with the railroad grant. He appealed to your office and by your office decision of August 7, 1886, the action of the local officers was reversed and directions were given then to allow St. Clair's filing. Of this action the company was advised but failed to take any action in the premises.

For some reason, not disclosed by the record, St. Clair never made filing under said decision, and does not appear to have taken any further action toward entering the land until he made homestead entry, as before stated, on August 1, 1892, under the second section of the act of forfeiture. Said section provides:

That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation.

It would seem, from the legislation, that the purpose of Congress was to provide first for the protection of those who were *bona fide* settlers upon any of the forfeited land at the date of the passage of said act, and to them was granted, for a limited period, a *preferred* right of entry "under the homestead laws and this act."

By the third section a right of purchase was granted those in possession of forfeited lands under deed, written contract, or license, executed prior to January 1, 1888, or who had settled with a *bona fide* intent to purchase of the company, but such right was limited to three hundred and twenty acres.

Within the enclosure maintained by Brandenstein and Godchaux were more than five thousand acres of forfeited lands, and the company's quit-claim had been secured for as much as three sections.

While the claim or color of title set up by Brandenstein and Godchaux may have been sufficient, prior to the passage of the act of forfeiture, to protect it in such inclosure, yet I do not think it sufficient to prevent the *bona fide* occupancy of the lands appertaining to the unearned grant.

Strictly speaking, any one settling upon lands set apart on account of the railroad grant were, as against the rights of said grant, trespassers until the lands were reclaimed by the United States and restored to the public domain, but Congress recognized that parties had so settled upon such lands and made provision for their protection.

Upon the land in question Brandenstein and Godchaux had no improvements of any nature whatsoever. Admitting that they are qualified to purchase under the act of forfeiture, yet such right is limited to three hundred and twenty acres of the five thousand or more within their inclosure, and as St. Clair was at, and long prior to, the passage of the act of forfeiture, a settler upon the land in question, I am of the opinion that his rights as a preferred claimant under the homestead laws, under the second section of the act of forfeiture, are superior to the claimed rights in Brandenstein and Godchaux under the third section of said act, and I, therefore, affirm your office decision and direct that St. Clair be permitted to complete final entry of the land in question upon his proof already submitted.

BANNISTER *v.* JOHNSON ET AL.

Motion for review of departmental decision of December 13, 1894, 19 L. D., 509, denied by Secretary Smith, March 19, 1895.

HOMESTEAD CONTEST—MARRIED WOMAN—DIVORCED WIFE.

TAYLOR *v.* WRANIG ET AL.

A married woman who applies for a divorce, on the conviction of her husband of a felony, is not entitled to plead the status of a deserted wife on account of her husband's absence in confinement under sentence of the court, as against a prior intervening contestant who attacks the homestead entry of her husband.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (I. D.)

The defendant, Mary Wranig, in the case of Jos. M. Taylor *v.* Wenzell Wranig and Mary Wranig, appeals from your office decision of November 29, 1893, wherein you deny her the right to intervene as a prior contestant to Taylor, against the homestead entry of her husband, Wenzell Wranig, for the NW. $\frac{1}{4}$ of Sec. 14, T. 11, R. 5 Oklahoma land district, Oklahoma Territory.

January 7, 1893, Taylor filed his affidavit of contest charging that Wenzell Wranig had wrongfully entered the land prior to the opening of the Territory under the act of Congress and the President's proclamation.

After notice was issued and the hearing fixed for May 30, 1893, the wife, Mary Wranig, filed her affidavit of contest, making the same charge as to her husband having wrongfully entered the Territory, and

asked that she be allowed to first prosecute her contest on the ground that her husband had been convicted of perjury and was then confined in the Kansas penitentiary; that she was living on the land with their children; that she had filed petition for divorce and the custody of the children, and that she be accorded the status of a deserted wife.

In *Roche v. Roche* (18 L. D., 9), it was held that:

A divorced wife who remains on the land covered by the homestead entry of her husband and shows the fact of her willful desertion and abandonment is entitled to the judgment of cancellation with a preferred right of entry.

In that case there was no adverse contestant and the abandonment of both wife and land was shown to have been willful, voluntary and without excuse. In this case the husband's absence from the wife was compulsory and whether she would avail herself of his conviction of a felony by obtaining a divorce was a matter solely within her own voluntary choice. She might have believed him wrongfully convicted and awaited his discharge, or she might properly do as she chose to do in this case and be divorced. But having herself elected to be divorced she does not thereby put herself in the position of a wife willfully deserted by her husband. In addition to that, even if she, by her divorce, could become a contestant, at the time that Taylor's contest was begun she was Wranig's wife and did not even file her petition for divorce until May, 1893, after Taylor's contest had been initiated.

Taylor was a *bona fide* prior contestant and acquired a preference right upon the cancellation resulting therefrom.

Your office decision is affirmed; the entry of Wranig is canceled and the contest of Mary Wranig is dismissed.

BYRON ALLISON.

Motion for review of departmental decision of December 6, 1894, 19 L. D., 458, denied by Secretary Smith, March 19, 1895.

ADDITIONAL HOMESTEAD—SECTION 6, ACT OF MARCH 2, 1889.

IMEL v. GRAVER ET AL.

An additional homestead entry, under section 6, act of March 2, 1889, can not be maintained without residence on the land covered thereby.

Secretary Smith to the Commissioner of the General Land Office, March 19, 1895. (C. W. P.)

Josiah Graver and Robert Porter have appealed from the decision of your office, of November 4, 1893, holding for cancellation their homestead entries, numbers 18417 and 18418 respectively.

The record shows that on May 2, 1892, Graver made homestead entry of lot 1, Sec. 6, T. 26 S., R. 23, W., Garden City land district, Kansas: on the same day Robert Porter made homestead entry of lot 2, same

section, township and range, under section 6 of the act of March 2, 1889 (25 Stat. 854).

February 13, 1893, Robert Imel filed affidavits of contest against these entries, alleging that claimants had never established *bona fide* residence on the land embraced in their entries, respectively.

After a variety of proceedings, which it is not necessary to recite, on motion to dismiss the contests, they were dismissed by the local officers. Imel appealed to your office.

Upon these appeals, your office held that there was no error on the part of the local officers in dismissing the contests; and, as it was clear from the claimants' own admission, that the law under which the entries were made had not been complied with by the claimants, there was no reason for a further hearing on the affidavits of contest, and the entries were held for cancellation. The claimants then appealed to the Department.

It appears from the record, that Josiah Graver March 16, 1885, made original homestead entry, No. 1387, of lot 4, Sec. 2, T. 26 S., R. 23 W., on which he made final proof and received final duplicate receipts March 9, 1892, and that Robert Porter, April 18, 1885, made original homestead entry, No. 2881, of lot 2, Sec. 2, T. 26 S., R. 24 W.; on which he made final proof and received final duplicate receipt April 15, 1892.

It is conceded that neither Graver nor Porter have resided on the land in controversy. They have, therefore, not complied with the requirements of the 6th section of the act of March 2, 1889, under which they claim. (See Circular, 8 L. D., 314).

For the reasons given in the decision appealed from I concur in its conclusions, and it is affirmed.

DANIELS v. JOSSART ET AL.

Motion for review of departmental decision of October 9, 1894, 19 L. D., 191, denied by Secretary Smith, March 19, 1895.

INCOMPLETE PATENT—JURISDICTION.

JOEL FAY.

Recording through mistake a purported patent will not deprive the Department of jurisdiction, where the original instrument is incomplete, not delivered, and based upon an unauthorized entry.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 19, 1895. (F. W. C.)

I have considered the appeal of Joel Fay from your office decision of March 21, 1893, holding for cancellation his private cash entry made September 8, 1870, for lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 7, T.

13 N., R. 3 W., Vancouver land district, Washington, for conflict with the grant for the Northern Pacific Railroad Company.

This land is within the primary limits of the grant for said company as shown by the map of general route filed in this office August 13, 1870, and map of definite location filed September 13, 1873.

Said private cash entry was allowed after the filing of the map of general route and before notice of the withdrawal ordered thereon was received at the local office.

A statutory withdrawal followed the filing of the map of general route on August 13, 1870, and the allowance of said purchase was consequently in violation of law and therefore invalid.

It seems, however, that patent was prepared to be issued upon said entry and completed, all except the placing of the seal of the General Land Office thereon, but was never delivered, and is with the papers forwarded on appeal.

As stated in your office letter, the practice formerly prevailing was to record the patents before the same were completed, and as the books then used for recording contained blank forms with printed seal, the record shows a completed patent.

It is upon this fact that claimant bases his appeal, and urges that the record is binding upon your office, and that the case must be considered as having passed beyond the jurisdiction of this Department.

This case seems to be in all respects similar to that of *Offutt v. Northern Pacific Railroad Company* (9 L. D., 407), except that in that case the effect of the recording of the incomplete patent does not seem to have been considered.

Under the circumstances, however, I do not deem this fact as material.

Had the patent here been delivered, even though incomplete, and the record thereof had shown a completed patent, the presumption would have been that the record was correct, and that the patent was complete; but as the paper, in the form of a patent, is yet in the possession of this Department, and is shown to be incomplete, the mistake in recording cannot affect the jurisdiction of this Department, and as the entry is invalid, I affirm your office decision, and direct that the same be canceled, and that the record of patent thereon be also canceled.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—HOMESTEAD ENTRY.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. v. HAGEN.

Overruled 25 L.R. 86
 The statutory withdrawal of indemnity lands on behalf of the main line of this road, as provided in the act of 1865, is a bar to the subsequent selection of said lands for the benefit of the St. Vincent extension of said road under the new grant therefor made by the act of March 3, 1871.

No order of withdrawal for the benefit of said branch line could take effect on lands covered by the prior withdrawal for the main line, hence a homestead entry of land so withdrawn is properly allowed so far as said branch line is concerned, but improperly allowed as to the main line, and would have to be canceled, had the company selected the tract for the benefit thereof, prior to the revocation of said withdrawal; but no such selection having been made, and the lands having been restored to the public domain, the said entry may stand intact subject to compliance with law.

Secretary Smith to the Commissioner of the General Land Office, March
 (J. I. H.) 20, 1895. (F. W. C.)

I have considered the case of the St. Paul, Minneapolis and Manitoba Railway Company v. Johannes T. Hagen, involving lot 2, Sec. 17, T. 126 N., R. 39 W., St. Cloud land district, Minnesota, on appeal by said company from your office decision of March 5, 1892, sustaining the action of the local officers at St. Cloud, in rejecting said company's application to select said lot as indemnity, on account of its St. Vincent Extension grant.

This land is within the indemnity limits on account of the main line of said road, that is, the road from Stillwater to Breckinridge, on account of which grants were made by the act of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), and withdrawal was ordered in 1869. It is also within the indemnity limits of the grant for what is known as the St. Vincent Extension of said road, the grant to aid in the construction of which was made by the act of March 3, 1871 (16 Stat., 588), and on account of which a withdrawal was ordered in 1872.

It is unnecessary to here repeat the history of the legislation relative to the grants made, and changes authorized in the location of the branch lines of this road; suffice it to say, that no location made of the branch line under the legislation embodied in the acts of 1857 and 1865, could have embraced this land, within the limits of the grant.

Under the provisions of the seventh section of the act of 1865, the lands within the limits of the grant, along the main line, both granted and indemnity, were ordered to be withdrawn upon the filing of maps designating the routes of the road. This withdrawal was a legislative withdrawal and remained in force until revoked May 22, 1891 (12 L. D., 541), under the authority of Sec. 4, of the act of Congress approved September 29, 1890 (26 Stat., 496).

No selection or claim has ever been made to this land on account of said main line.

On June 23, 1886, during the existence of said withdrawal on account of the main line, the local officers permitted Hagen to make timber-culture entry of the land in question, which is still of record.

On September 2, 1890, the Manitoba Company tendered a selection of this land on account of the St. Vincent Extension, which application to select was rejected by the local officers for conflict with Hagen's entry.

Upon appeal by the company from said rejection, your office decision of March 5, 1892, expressed the opinion that, inasmuch as the land was in reservation for the main line at the time said application was made, this reason should also have been assigned as cause for the rejection of said application.

An appeal from your said office decision brings the case before this Department.

From what has been said it will be seen that the selection in question having been made on account of the St. Vincent Extension, rests upon the act of March 3, 1871, *supra*. And the question arises: can the reservation made under the grants of 1857 and 1865, under which this company claims, be pleaded against said company as bar to the selection made as above described?

As before stated, no location was possible of the grants provided for in the acts of 1857 and 1865 on account of the branch lines of said road, so as to embrace this land, and the grant made by the act of 1871, being a new grant; providing for an entire change of line; subject to the same conditions as contained in the acts of 1857 and 1865, must, in the matter of the adjustment of said grant, be considered as separate and distinct from said earlier grants. (13 L. D., 349.)

In the case of the St. Paul and Pacific Railroad company *v.* Northern Pacific Railroad company (139 U. S., 1), the supreme court of the United States in considering the nature and effect of the grant made to said first mentioned company by the act of 1871, held as follows:

It is, however, contended, in answer to this position of an earlier grant to the plaintiff, that the acts of March 3, 1865, and March 3, 1871, are to be treated, not as distinct acts, but simply as amendments to the act of March 3, 1857, and to be given an operation as of that date. We do not assent to this position. Though the act of March 3, 1865, by its new and additional grants, amended the previous act of 1857, its operation upon any lands previously reserved to aid in any work of internal improvement was expressly restrained. What was reserved before remained reserved afterwards. And the act of 1871 does not purport in any sense to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines in consideration of the relinquishment of certain lands. The old lines were to be given up, and all the benefits attached to them, in consideration of which new lines were authorized. The old lines were not amended, but were abandoned. There was no partial release of the accompanying grants, but whatever rights attended the original lines were to be surrendered.

The lands on account of the original grant along the main line having been withdrawn by legislative authority, required authority from Congress before the same could be revoked, and, while the reservation continued, I am of the opinion that it was a bar to any selection on account of the grant made by the act of 1871.

In the case of *Thunie v. St. P. M. and M. Ry. Co.* (14 L. D., 545), it was held that:—

The grant for the St. Vincent extension of the St. Paul, Minneapolis and Manitoba railway is a new grant, later in date to that made for the main line, and lands withdrawn for the benefit of the latter, as indemnity, are excepted from the subsequent operation of the grant for the branch line.

It must be admitted that the same condition existing at the time of selection of land for indemnity purposes, which if existing at the date of the definite location would defeat the grant, must be held to be a bar to selection. In the above case it was held that the reservation for indemnity purposes on account of the main line, defeated the grant for the branch line, because such reservation was in existence at the date of the definite location of the road.

Said reservation continued in force, as before stated, until revoked May 22, 1891, under authority of the act of Congress approved September 29, 1890, *supra*.

It was, therefore, in force at the date of selection of this tract for indemnity purposes, on account of the branch line, and was a bar to such selection.

For the same reason Hagen's entry was improperly allowed, and, as against the grant for the main line, must have been canceled, had any selection been made on account thereof before the revocation of the said withdrawal, but as no selection or claim was ever made on account of said main line, for the land in question, whatever bar formerly existed to the allowance of Hagen's entry was removed by the revocation of said withdrawal and the restoration of the land. Having been withdrawn on account of the main line, no subsequent order of withdrawal on account of the branch line could have affected the land, consequently, as against said branch line, the entry by Hagen was properly allowed. As said company could not avail itself of the withdrawal on account of the main line for the benefit of its branch line, the grant for which rests upon the act of March 3, 1871, the company's selection presented during the continuance of the withdrawal on account of the main line, and long after the entry by Hagen, was properly rejected.

If it be granted that the presentation of selection on account of the branch line was equivalent to a waiver of the benefit of the withdrawal for the main line, and that such a waiver would be effective, yet this would not benefit the company under its selection, as such waiver would inure to Hagen by reason of removing any bar formerly existing to his entry.

Your office decision is therefore affirmed and Hagen's entry will be permitted to stand subject to compliance with law.

TOWN LOT CONTEST—OCCUPANCY—IMPROVEMENTS.

BARNES *v.* HODGES.

The law does not prescribe the character or value of the improvements that town lot settlers are required to make. Occupancy in good faith for purposes of residence or business is the test, and in passing upon the character and value of improvements, to determine the question of good faith, it is proper to consider both the financial and physical ability of the claimant.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (E. E. W.)

The townsite of Stillwater, Oklahoma, was entered October 9, 1890, and on November 3 following the contestant, John H. Barnes, and the contestee, John V. Hodges, both applied for deed to lot 12, of block 28. The townsite board heard the contest thus formed, and awarded the lot to Barnes, and Hodges appealed. The General Land Office affirmed the action of the townsite board, and then he appealed to the Department.

Barnes, who is a tinsmith, lived on a homestead claim adjoining Stillwater, and worked at his trade in town. He took possession of the lot about the 20th of June, 1889, and laid the foundation for a house twenty by twenty feet in size on the 10th of July following. This, he says, was a larger house than he was able to build, and in August he went inside of this foundation, and began the erection of a smaller house—one twelve by fourteen feet in size. He worked along on this house as he could spare the time from the regular work by which he supported his family, and on the 9th of December, 1889, the walls were up, though it was without roof or floor. On that day Hodges entered with a force of men, tore down all of Barnes' work, threw it off the lot, and started to build a house himself. Barnes immediately put his material back and rebuilt the house in rear of the one Hodges was building on the front. He finished the house on the 10th, and immediately stored a load of grain in it, and has used it ever since as a storage room for grain, flour and stoves. Hodges completed his house on the front, and after using it some months as a pool room, moved his family into it, and has occupied it ever since as a dwelling. It is upon these facts that the parties base their respective claims.

The Department concurs with the General Land Office and the townsite board that Barnes has shown good faith in the improvement and occupancy of the lot, and that the destruction of his unfinished house, and improvement and occupancy of the ground by Hodges, were in violation of his rights. The law does not prescribe the character or the value of the improvements that town lot settlers are required to make. Occupancy in good faith for purposes of residence or business is the test, and in passing upon the character and value of improvements to determine the question of good faith, it is proper to consider both the financial and physical ability of the claimant.

The decision of the General Land Office is affirmed.

RIGHT OF WAY—ACT OF MARCH 3, 1891—RESERVATION.

H. V. GRUENINGEN.

The provisions of the act of March, 3, 1891, respecting right of way privileges, for irrigation purposes, are applicable to the Sequoia National Park reservation, established by acts of September 26, and October 1, 1890, subject to the condition that the right of way, if granted, shall not interfere with the proper occupation of the reservation by the government.

Assistant Attorney-General Hall to the Secretary of the Interior,
March 21, 1895. (S. V. P.)

By reference, dated March 15, 1895, of the Acting Secretary, I have before me the letter of Mr. H. V. Grueningen, of Three Rivers, California, in which he requested information as to whether he may be permitted under the law to construct an irrigation ditch across the land included within the Sequoia National Park. On this request my opinion is desired, and I submit the following:

Mr. Grueningen's request was referred to the General Land Office for "consideration and report," and the report of said office was received on March 14, 1895.

In said report the Commissioner of the General Land Office expresses the opinion that the provisions of the act of March 3, 1891, 26 Stat., 1095, granting right of way privileges for canal, ditch and reservoir purposes, are applicable to the case presented herein, subject to the condition that the right of way, if granted, shall not interfere with the proper occupation of the reservation by the government. In this opinion I concur, and I have accordingly prepared a letter, for your signature, in which Mr. Grueningen is advised to make his application in accordance with the departmental regulations, showing clearly in the plat of location the topography of the reservation where it is crossed by said ditch, the boundary lines of said reservation, and such other matter as may enable the Land Department to thoroughly understand in what manner the said reservation, and its use by the government, may be affected by granting his application.

Approved,

HOKE SMITH,

Secretary.

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, March 13, 1895.

The Honorable, The SECRETARY OF THE INTERIOR.

SIR: I have the honor to acknowledge the receipt, by reference from the Department for consideration and report, of a letter of H. V. Grueningen, of Three Rivers, California, of February 9, 1895, stating

that his homestead is situated within half a mile of the Sequoia National Park, and asking for permission to construct a ditch to convey water for irrigating purposes from a point half a mile within the park, which ditch, he states, is necessary in order to have sufficient water for that purpose.

The Sequoia National Park was created by acts of September 26, and October 1, 1890 (26 Stat., 482 and 650), which provide that the lands described are "reserved and withdrawn from settlement, occupancy or sale, under the laws of the United States," and that the reservation shall be . . . "under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same."

I am aware of no other authority for action by the Secretary of the Interior of the kind required than the act of March 3, 1891 (26 Stat., 1095), which was passed the following year.

By section 18 of the act, right of way for canals and reservoirs is granted for irrigation purposes

through the public lands and reservations of the United States. . . . Provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the Department of the government having jurisdiction of such reservation.

The question here is whether such national park is included in the term "reservations of the United States," as used in the act of 1891. This question as to forest reserves was presented in the case of *H. H. Sinclair et al.*, (18 L. D., 573) but the decision was rendered on other grounds. The language was also considered by the Department so far as it concerns Indian reservations in the case of *Florida Mesa Ditch Company* (14 L. D., 265) and it was there held that Indian reservations were not contemplated by the terms of the act, principally on the ground that the language of the act indicates that reservations had in view were those actually and directly used by the government. This national park is clearly within that class of reservations, and the inquiry arises whether the act of 1891, granting right of way upon such reservations was intended to modify, to that extent, the provision of the prior act of 1890, reserving and withdrawing the lands in the park from occupancy.

By a necessary implication the lands in all reservations are reserved and withdrawn from occupancy, and it would, therefore, appear that the grant of right of way through reservations would have no operation whatever unless it were construed to modify the express or implied prohibition of the occupancy of reservations, and I am, therefore, of the opinion that the grant of 1891, of right of way through reservations of the United States was intended to include this national park.

This being so, it is important to inquire the effect of the provisions of the acts in question upon the rights to be acquired under the grant. The act of 1891 provides that the right of way shall be so located as not to interfere with the proper occupation of the reservation, and the acts of 1890 provide that the reservation shall be under the exclusive control of the Secretary of the Interior, who is directed to make and publish such rules and regulations as he may deem necessary for the care and management of the reservation, and other measures to fully carry out the objects of the act, it would, therefore, in my opinion, be proper for the Secretary of the Interior to require that the right of way should be so located and used as not to violate any of the regulations of the Department for the care and management of the reservation, for otherwise the ditch might be so located as to interfere with its proper occupation; such conditions would appear to be within the contemplation of the act of 1891, which seems intended to extend to irrigation any reasonable benefits which shall not encroach upon the objects of the reservations; and such conditions may even go so far as to restrict the rights acquired by the grant, so as to exclude the rights to cut timber on the right of way and to take from the public lands adjacent to the line of the canal or ditch material, earth and stone necessary for construction, as such right would interfere with the proper occupation of the reservation, and must accordingly be waived if the right of way is granted.

My view of the question, therefore, is that if the grant of right of way upon reservations is to have any effect whatever, it will apply to the Sequoia National Park, subject to the condition that it shall not interfere with the proper occupation thereof by the government, under which condition would be included a compliance with the rules and regulations made by the Secretary of the Interior for the care and management of the park, and also such other "measures as shall be necessary or proper to fully carry out the objects and purposes" of the acts creating the park.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

PUBLIC SALE—ISOLATED TRACTS—SECTION 2455, R. S.

CHARLES H. BOYLE.

The acreage that may be purchased, by any one person, at a public sale of isolated tracts is not limited in amount by the provisions of the acts of August 30, 1890, and March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (J. L.)

Charles H. Boyle has appealed from your office decision of June 21, and November 6, 1893, holding for cancellation his final certificate No. 9680, dated April 2, 1892, of his purchase at a public sale held under

section 2455 of the Revised Statutes, of twelve distinct and isolated tracts of land containing in the aggregate 354.92 acres.

The lands involved are situated in the McCook land district, Nebraska, and are described as follows:

	Acres.
Lot 6, Sec. 3, T. 2 N., R. 33 W., containing.....	21.20
" 8, " 3, " " " " " "	15.00
" 9, " 5, " " " " " "	14.60
" 1, " 9, " " " " " "	7.80
" 2, " 9, " " " " " "	35.95
" 3, " 1, " 3 N., " " " "	39.36
" 4, " 1, " " " " " "	39.11
" 1, " 9, " 2 N., " 34 W., "	37.00
" 1, " 10, " " " " " "	36.10
" 1, " 19, " " " " " "	29.80
" 2, " 2, " " " " " "	39.00
NE. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 29, T. 2 N., R. 34 W., containing.....	40.00
Total	354.92

By letter "C" of September 10, 1891, upon the application of Charles H. Boyle, your office instructed the local officers to offer at public sale, after publication, all of the isolated tracts aforesaid, except lot 2 of section 9, T. 2 N., R. 33 W., containing 35.95.

By letter "C" of January 22, 1892, at the instance of Andrew McConnell, your office instructed the local officers to offer at public sale in like manner, said last mentioned lot 2 of section 9, T. 2 N., R. 33 W., containing 35.95 acres.

Both of said applicants were expressly notified by your office that they would have "no preference right over others desirous of purchasing the lands, as the same must be offered at public sale, and disposed of to the highest bidder for cash.

On April 2, 1892, the public sale of all of said twelve tracts of land took place, after due publication, and in compliance with instructions and regulations. At said sale, Charles H. Boyle, being the highest bidder, became the purchaser of 354.92 acres of land at \$1.25 per acre; paid to the receiver in cash the price of the land and all lawful charges; and took his final receipt and final certificate entitling him to a patent for the 354.92 acres of land aforesaid.

Said sale was promptly reported by the local officers to your office.

On June 21, 1893 (letter "C") your office, of its own motion, told the local officers that they had no authority to offer for sale lot 2 of section 9, T. 2 N., R. 33 W., containing 35.95 acres; and that therefore Boyle's purchase was "illegal so far as it relates to said lot," and directed them to so inform Mr. Boyle; and also call upon him to furnish the affidavit required under the act of August 30, 1890; which affidavit, known as "Form 4-102 b," is printed on page 214 of General Circular 1892, as follows:

LAND OFFICE AT ———,

(Date) ———, 189—.

I, ———, of ———, applying to enter (or file for) a ———, do solemnly swear that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land which, with the tracts now applied for, would make more than 320 acres, except ——— for ——— settled upon by me prior to August 30, 1890. Said settlement was commenced ———, and my improvements consisted of ———.

Sworn to and subscribed before me this ——— day of ———, 189—.

On July 8, 1893, the local officers called the attention of your office to the fact that letter "C" of January 22, 1892, had been overlooked, and transmitted a motion filed by Mr. Boyle for a review of your office decision of June 21, 1893, in which he insists:

1. That the local officers did have authority to sell the lot of 35.95 acres aforesaid.

2. That your office has no authority to require him to make and furnish an affidavit according to the form above quoted.

3. That as a purchaser at the public sale aforesaid he has the right to buy, and receive patent for, the whole of the 354.92 acres of land, bought and paid for by him.

After consideration of said motion for review, your office on November 6, 1893 (letter "C"), admitting that letter "C" of January 22, 1892, had been overlooked, pronounced its decision as follows:

The fact that said lot 2 (35.95 acres) was included in the published notice with the other tracts offered for sale, the offering of all of said tracts having been at that time duly authorized by this office, is not, in my opinion, a material question in this case. But the fact that said entry (meaning Boyle's purchase) contains 34.92 acres in excess of the three hundred and twenty acres, which under the acts of August 30, 1890, and March 3, 1891, a party may acquire title to, I think is: see instructions of Honorable Secretary Noble, based upon the opinion of the Honorable Attorney-General, 12 L. D., 81. And this rule applies as well, in my judgment, to lands being agricultural in character, purchased at authorized public sales in isolated tracts, as to lands entered under the homestead law.

It will be necessary, therefore, for Mr. Boyle to relinquish, one or more, as he may elect, of said tracts, in order that he may bring the aggregate area of his said entry (or purchase) down to the acreage limited by law, viz: 320 acres, and to furnish the affidavit, form 4-102 b, required under the act of August 30, 1890.

In the event he (Boyle) declines to do so, and this judgment becomes final, his entry (or purchase) being for the above reason illegal, will have to be canceled.

The motion to release said entry (or purchase) from suspension and to pass the same to patent is accordingly denied.

From said decision Boyle has appealed to this Department.

I am clearly of opinion that your office decision is erroneous.

Section 2455 of the United States Revised Statutes, was first enacted August 3, 1846 (9 Statutes, 51), and reads as follows—

Sec. 5. That it shall and may be lawful for the Commissioner of the General Land Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands, which in his judgment, it would be proper to expose to sale in like manner.

Said section then became and ever since has been a part of the system adopted by Congress for sale of public lands at public auction, with a view to revenue. (See 1 Lester, pages 342 to 350 inclusive.) Under that system the purchaser was limited as to quantity, only by his ability to pay.

On August 30, 1890, in the act entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1891, and for other purposes," (26 Statutes, page 391) Congress enacted as follows—

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws, shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws; but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement is validated by this act.

The Instructions by Secretary Noble published in 12 L. D., 81, were dated December 29, 1890, and simply construed and declared the meaning of the clause above quoted, in respect to the limitation of the rights of persons who shall "enter upon" public lands with a view to occupation, entry or settlement under any of the land laws. The terms "enter upon," "enter" and "make entry," have separate and distinct meanings in the administration of the Land Department (see *Smith v. Townsend*, 148 U. S., 490, 500). Mr. Boyle, as purchaser at a public sale, did not "enter upon" any one of the twelve isolated tracts which he bought and paid for. Therefore the statute above quoted, and the instructions above referred to did not embrace him.

On March 3, 1891, in the 9th section of the act entitled "An act to repeal timber culture laws, and for other purposes" (26 Stat., 1095-1099), Congress enacted—

Sec. 9. That hereafter no public lands of the United States, except abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section 2455 of the Revised Statutes, and mineral and other lands the sale of which at public auction has been authorized by acts of Congress of a special nature having local application, shall be sold at public sale.

In section 10 of the same act (26 Stat., 1099) Congress excepts also, all lands which the United States, by treaty or agreement with Indian tribes, has promised to sell or dispose of for the benefit of such tribes.

It would be a fraud upon the Indian tribes for Congress to undertake to limit the number of bidders, for lands to be sold for their benefit.

Such limitation might work disappointment and injustice to local interests, in the case of mineral and other lands the sale of which at public auction has been authorized by acts of Congress of a special nature having local application.

The public revenue would certainly be injuriously affected, by limitation of the number of bidders for abandoned military and other reservations, and for isolated and disconnected tracts.

By section 17 of the act last mentioned (26 Statutes, 1101), Congress modified Secretary Noble's instructions of December 19, 1890, aforesaid, and enacted that thereafter the limitation prescribed in the act of August 30, 1890, aforesaid, shall be construed to include "only agricultural lands, and not to include lands entered or sought to be entered under mineral land laws."

After careful consideration of said statutes, I am of opinion, that Charles H. Boyle had the right, as highest bidder at public sale, to buy every one of the tracts of land above described. And having paid for them, he is now entitled to a patent for the same.

Your office had no authority to require Mr. Boyle to relinquish any part of his said purchase, or to furnish an affidavit according to form 4-102 b.

Your office decision is hereby reversed. Your office will cause to be issued to Boyle a patent for the 354.92 acres of land described in the final certificate issued to him.

WAGON ROAD GRANT—WITHDRAWAL—SETTLEMENT CLAIMS.

WILLAMETTE VALLEY AND CASCADE MT. WAGON ROAD CO. v. HAGAN.

The grant of July 5, 1866, did not attach to any specific tract by definite location or construction of the road, but by actual selection.

No rights either legal or equitable as against the grantee can be acquired by settlement on, or entry of lands withdrawn by executive authority in aid of a congressional grant, and the failure of a grantee in such case to respond to the published notice of a settler's intention to submit final proof, can not operate to defeat the grantee's right of selection.

Where a withdrawal of lands for the benefit of a grant is of record, the grantee should be specially cited when final proof is tendered under an adverse settlement claim.

The cases of the Willamette Valley and Cascade Mountain Wagon Road Co. v. Chapman, 13 L. D., 61, and Brady v. Southern Pacific R. R. Co., 5 L. D., 407 and 658, overruled.

An entry is not confirmed under the proviso to section 7, act of March 3, 1891, where a right to the tract under a congressional grant is asserted at the date of said entry and remains unadjudicated without laches on the part of the grantee.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 28, 1895. (E. F. B.)

This case comes before the Department on the appeal of the Willamette Valley and Cascade Mountain Wagon Road Company from the decision of your office of November 16, 1893, rejecting the claim of said company to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 19, T. 16 S., R. 19 E., The Dalles, Oregon.

Upon the application of the company, I have considered with this appeal the cases of Edward R. Taylor and George L. Myers, now pending on the several appeals by said company from the decision of your

office rejecting the claim of the company to the tracts involved therein, it being alleged that every important principle controlling the adjustment of this grant is involved in one or the other of said cases.

There are practically but two questions presented by these several appeals:

First, as to when the right of the company attaches to the odd sections granted.

Second, as to when the withdrawal for the benefit of the road becomes effective, and whether any claim to any of the odd sections withdrawn can be perfected as against the right of the company that was not initiated prior to the date of said withdrawal.

It is contended by the company that when the route of the road was definitely fixed, the granting act withdrew from entry every odd section within six miles on each side of the road, which was not expressly excepted or reserved by the grant, and that thereafter no right of pre-emption or homestead right could be subsequently acquired to any of the tracts withdrawn.

The position of counsel is predicated upon the theory that the act of July 5, 1866 (14 Stat., 89), making the grant to aid in the construction of this road, created a tenancy in common between the United States and the State of Oregon as to all of the odd sections within the limits of the grant, and that when the road was definitely fixed, there vested in the grantor and grantee, as tenants in common, the title to every odd section within the limits of six miles on each side of the road, not expressly excepted or reserved by the act.

It is apparent that this theory can not be sustained, without overruling the decision of the Department in the case of the Willamette Valley and Cascade Mountain Wagon Road Company *v.* Rinehart (5 L. D., 650), in which it was distinctly held that the construction of the road and the filing of the map of definite location did not cause the grant to attach to any specific tract of land, or of its own operation withdraw the lands from entry, but that the grant only attached by actual selection of the specific tract.

An examination of this question has failed to disclose any reason for disturbing this ruling, but, on the contrary, I am convinced that it is the true construction of the grant and is sustained by authority.

It is argued by counsel that this is a grant of an undivided interest in a tract of land; that the odd sections granted, whether surveyed or unsurveyed, not having been segregated by selection, are held under the joint right of possession with the other odd sections, until selection is made by the company of the particular section.

The grant is of "alternate sections of public lands designated by odd numbers, three sections per mile, *to be selected* within six miles of said road." It is not a grant of an undivided interest in any tract of land, nor is there any expression in the grant to indicate that a joint holding of any tract of land by the government and the State was contemplated.

As stated by the Secretary, in the case of Rinehart heretofore cited, "the act makes no provision for filing of map of definite location, nor for any withdrawal of lands from entry for the benefit of said road, but it is the completion of the road that gives position to the six mile limits within which selections may be made." After the line of the road is definitely fixed by actual construction, the right is given to the company to satisfy its grant by making selections, to the extent of three sections per mile from all the odd sections within six miles on each side of said road, unless excepted or reserved by the act. That the land was unsurveyed at the date of the grant can make no difference. It was not a grant of a half interest in all the odd sections, nor of an undivided moiety in any tract of land, but right to select a given number of odd sections within defined limits. As stated by the Secretary, in the Rinehart case (page 653), "the lands that Congress granted or intended to grant could only be ascertained when they were actually selected within the limits of six miles of the road."

The distinction between a grant of an undivided moiety and the grant of a right to select from certain designated sections is illustrated by the opinion of the Attorney-General, in the Portage City case, 8 Ops. A. G., 255. That was a grant to the State of Wisconsin, for the purpose of improving the Fox and Wisconsin rivers, of "a quantity of land equal to one half of three sections in width on each side of the said Fox river."

"Here" (as stated by the Attorney-General)

is not a grant of land along arbitrary lines unascertained, like those of unlocated railroads, nor a grant at large in a whole State, but a grant within limits geographically determined by the act, and needing only surveys according to established statute rules to possess absolute precision of locality, and then, requiring but to be equally divided between the United States and the State.

In that case the State held as tenants in common with the United States the title to all lands within the limits "geographically determined by the act," for the reason that the grant to the State was for an undivided half interest in the quantity of lands thus designated. When the survey was made it gave absolute precision to the grant, but it did not indicate or determine the particular land that the State should hold in severalty. It might have selected either odd or even sections. It was seized of an interest in the entire estate, which required partition to designate the lands that each should severally hold.

No such estate was created by this grant. The right of the company did not attach to any particular section until after selection, and the construction of the road and filing of map of definite location did not operate to withdraw the lands from settlement and entry.

But a withdrawal of lands by the Secretary, in the exercise of his authority, for the purpose of enabling the company to satisfy the grant by making selections in accordance with the granting act was equally

as effective to withhold the lands from settlement and entry as if it had been provided by the act.

This withdrawal did not become effective, as held in the case of *Rinehart*, until it was filed in the local office, but after such withdrawal took effect it operated to reserve, for the benefit of the company, the odd sections within the six mile limits that were at the date of said withdrawal free from any claim or right, and thereafter the odd sections affected by such withdrawal would be not subject to settlement and entry under the homestead and pre-emption laws, nor could any right be acquired by settlement and occupation upon such lands that would defeat the right of the company to make selection of the same.

In the case of *Riley v. Wells* (19 U. S., L. Ed., 648), the court say, that a settlement upon land withdrawn by executive order was without right, and the possession was continued without right, the permission of the register to prove up the possession and improvements, and to make entry under the pre-emption laws were acts in violation of law and void, as was also the issuing of the patents.

This rule was again announced by the supreme court in the case of *Wood v. Beach* (156 U. S.) The court, in speaking of the effect of a valid withdrawal to withhold the land withdrawn from the acquisition of any legal or equitable right by occupation and settlement, use this language:

Upon these admitted facts it is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or pre-emption entry, and cannot make his unauthorized occupation the foundation of an equitable title. He was not acting in ignorance, but was fully informed both as to the fact and the law. He deliberately took the chances of the railway company's grant, being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land. But the event he hoped for never happened. The party for whose benefit the withdrawal was made complied with all the conditions of title and took the land.

See also *Shire v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 10 L. D., 85.

If the lands withdrawn were not subject to settlement and entry, and if no legal or equitable right could thereafter be acquired by settlement and occupation, so as to defeat the company's right of selection, I can not see how the company's right could be defeated by failure to appear at the local office and object to the final proof, in response to the general notice by publication. The withdrawal by the Secretary was intended to withhold these lands from settlement and entry for the benefit of the company. The right of the road to select lands within the limits would be impaired, and the benefits intended to be conferred practically denied, if entries should be allowed without the express relinquishment by the company and waiver of its right of selection. Furthermore, the withdrawal of these lands for the benefit of the company was a matter of record, and the company

should have been specially cited to appear. The publication of notice of intention to make final proof is not sufficient notice to a claimant of record, but simply to such claimants as can not be discovered by an examination of the records of the local office.

Entertaining these views, I am satisfied that the decision of the Department in the case of *Willamette Valley and Cascade Mountain Wagon Road Company v. Chapman* (13 L. D., 61), holding that the failure of the company to respond to the settler's publication of notice to submit final proof precludes the company from thereafter making objection to the allowance of such entry, is clearly contrary to the decisions of the supreme court, and to the established rules of practice, and on this point said decision and the decision in the case of *Brady v. Southern Pacific Railroad Company*, 5 L. D., 407, 658, are hereby overruled.

It is urged by counsel for the entryman that these entries are confirmed by the proviso to the 7th section of the act of March 3, 1891. It is a sufficient reply to say that said act did not confirm an entry for any tract of land to which there was an adverse claim existing at date of entry, and still existing when the adverse claimant had no opportunity of asserting his claim when the entry was allowed, and has not since been guilty of laches in failing to prosecute it.

The lands in controversy are within the limits of the withdrawal made for the benefit of the road, and was received at the local office July 3, 1871. Hagan, a qualified entryman, made homestead entry of the tract December 16, 1876, his final proof showing that he settled upon the tract in December, 1871, after the withdrawal of the land, but subsequently he filed an affidavit corroborated by two witnesses showing that his settlement upon the land was made in February, 1871, prior to the withdrawal. The only irregularity in this proceeding was the failure to cite the company to specially appear, but as the supplemental proof showed that the settlement was commenced prior to withdrawal, and it is not denied by the company, I see no reason for ordering a further hearing in this case. Hagan's entry will be allowed to remain intact.

Decisions in the cases of *Edward R. Taylor* and *George L. Myers* will be rendered upon their appeals, in accordance with the principles herein announced.

While I recognize the propriety of the withdrawal made by the executive to protect this company in the exercise of its right to make selection in satisfaction of its grant, I am also impressed with the importance of requiring the company to make the selections necessary to satisfy this grant as speedily as possible, in order that the surplus remaining in the limits of this withdrawal may be restored to settlement and entry. The reason alleged by the company for failure to make selections to satisfy the grant is, that the government has failed to have the lands surveyed. That reason no longer exists. The act of

August 20, 1894 (28 Stat., 423), authorizes the deposit of a sufficient sum by the owners of grants of public lands for the purpose of having a survey of the townships within the limits of their grants. If this company refuses to accept the benefit of this act, it will be required to make its selections from the surveyed portion of lands along the line of its road, and the withdrawal of the unsurveyed lands along the line of the road will be revoked. It will, therefore, be notified that a survey must be made of such lands as it desires to survey, on or before November 1st next, and to make all selections necessary to satisfy its grant, within ninety days thereafter, and thereafter the withdrawals will be revoked.

TOWN LOT CONTEST—TENANT—ATTACHMENT PROCEEDINGS.

SMITH ET AL. v. COPLIN.

The occupancy of a town lot as the tenant at will of another occupant does not invest such tenant with any right to a deed as against his landlord.

The occupancy and improvement of a town lot does not give the occupant an interest therein that can be reached by attachment.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (E. E. W.)

This is a contest for the entry of lot 7, block 3, in the town of South Oklahoma, Oklahoma Territory. Smith and Miller applied for deed December 8, 1891; Zaloudek December 18, 1891, and Coplin January 6, 1892. On the trial of the contest thus formed, the townsite board of Oklahoma City decided in favor of Zaloudek. Coplin, and Smith and Miller, appealed to the General Land Office. The General Land Office affirmed the decision of the townsite board, and Smith and Miller appealed to the Department.

The facts of the case are found to be as follows: Louis Zaloudek and a man named Urban were actual occupants of the lot in controversy, and claimed exclusive right to the same. There was a house sixteen by twenty feet on the front of the lot, which they occupied, and in which they kept a public meat market. About the first of April, 1891, Urban sold his interest in the lot to Louis Zaloudek, and then in October following, Louis conveyed all of his right by quit-claim deed to his brother Anton, \$600 being named as the consideration. Anton also claims that the purchase from Urban was made for him, and with his money, and it appears that he did at that time succeed Urban as joint occupant of the lot with Louis, and also as the latter's partner in the meat market. After purchasing Louis' interest, he continued his occupancy of the lot, in person or by tenant, until the institution of this contest, and it is upon these facts that he bases his claim of right to enter.

During the joint occupancy of the lot by the Zaloudeks, they permitted a man named Smith to move a "shack" on to the rear end of it, until he could get a lot of his own to put it on, and in July, 1891, he took the contestee, Coplin, into this "shack" with him. About the first of April, 1892, he sold the "shack" to Coplin for \$35. He did not pretend to sell any right to the lot, but Coplin makes his occupancy of this "shack" the basis of his claim of right to deed.

Smith and Miller base their claim of right to deed on a seizure of the lot under an order of attachment issued in their favor by the county court of Second county, Oklahoma, against Louis Zaloudek, June 17, 1890.

Coplin was merely the tenant at will of Zaloudek, under the latter's right of occupancy, and his occupancy of the lot, as such tenant, no matter how long continued, could never invest him with right to deed as against his landlord.

The claim of Smith and Miller has no foundation at all. The legal title to the lot was in the United States, and Zaloudek's improvement and occupancy gave him no equitable interest therein that could be reached by attachment. Moreover, the county courts of Oklahoma had no jurisdiction to order or decree sale of real estate, and the writ of attachment which the court issued in this case did not authorize seizure of real estate. It merely commanded the officer to "attach the goods, chattels, stocks, or interests in stocks, rights, credits, moneys and effects of the defendant." And the record does not show that there was any sale, or even an order of sale, or any proceeding whatever beyond the levying of the attachment. The claim would be wholly insufficient to entitle the parties to deed, even if there was no adverse claim.

The decision of the General Land Office is affirmed.

TOWN LOT CONTEST WRONGFUL POSSESSION.

CASTEEL v. FULLER.

The right of a town lot claimant is not defeated by his failure to maintain actual possession and occupancy, where such failure is due to threats of force and armed violence.

No right to a town lot can be based upon a wrongful possession, acquired in open violation of another's occupancy.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (E. E. W.)

This contest is for deed to lots 11 and 12, block 35, in Guthrie, Oklahoma. The first settler on these lots was Anthon Hartman, who established occupancy thereon, April 23, 1889, and after plowing furrows around them and marking them with stakes, showing his name, he sold his claim thereto on the 30th of April following to the contestee, Randall Fuller, for \$16. Fuller immediately hired a wagon, team of horses

and men and went to the lumber yard and bought a load of lumber with which to fence the lots and build a house thereon. He was gone about thirty minutes and when he returned he found J. K. Casteel, the husband of the contestant, Sarah A. Casteel, in the act of putting up a small tent on the lots. He at once notified Casteel of his purchase from Hartman and ordered him to leave, which Casteel refused to do; on the contrary, he forbade Fuller to make any improvements on the lots and declared that he intended to hold possession of them if he had to do so with his guns. Fuller went ahead, however, and built a fence and the foundation for a house thereon. The testimony shows that Casteel had a gun across his lap and a pistol in his pocket, and that he declared that he did not care for the law and if Fuller dispossessed him he would kill him. Fuller then desisted, and said he would look to the law for redress. Shortly afterwards his fence was torn down, and the lumber which he had hauled as aforesaid, or the greater portion thereof, was used by Casteel in the construction of a house. During the summer Casteel erected a house, dug a well and made other improvements on the lots, the whole being valued at from \$150 to \$200. His wife was not with him when he took possession of the lots, but she joined him on the 8th of May following, and later in the summer he left home and was gone several months. On the 8th of October, and as it appears during her husband's absence, a certificate of right of occupancy of the lots was issued to the contestant, although her husband was not at home again, with the exception of two or three days at a time on two occasions, and she testifies that he said on his last visit that he never intended to return.

On the 16th of September Fuller applied for a deed to the lots. It seems that the Casteels had sold or mortgaged their pretended claim to the lots to one Satterlee, who sold to Kirkland, and Kirkland to a woman named Lena Govreau, but that, on the 24th of January, 1891, Lena Govreau reconveyed the land to Mrs. Casteel by a quit-claim deed, and two days later she applied for deed. On the trial of the contest thus formed the townsite board awarded the lots to Mrs. Casteel, and Fuller appealed. The General Land Office reversed the holding of the townsite board, and then Mrs. Casteel appealed to the Department.

The proof shows that Hartman was the first person to take possession and improve the lots. His staking and plowing was a sufficient initiation of settlement thereon, and the sale by him to Fuller seems to have been made in good faith, and the improvements already on the lots are deemed sufficient by the Department to protect them for the short time that Fuller was gone to the lumber yard to haul lumber. The proof is also convincing that Fuller was only prevented from maintaining actual possession and occupancy of the lots by Casteel's threats of force and violence, and that he only yielded possession to avoid the danger of being shot. Instead of this fact indicating bad faith on his

part it tends to show that he was a law abiding citizen, and trusted to the law for redress rather than attempt to maintain his rights by force of arms himself. The Department cannot give its sanction to the course pursued by Casteel. It looks too much like allowing one man to take another's property by force of arms. Casteel's possession was wrongful and was taken in open violation of Fuller's rights, and before deserting his wife he had established no right thereto which would entitle her to a deed to the lots.

The decision of the General Land Office is affirmed.

TOWN LOT CONTEST—COMMUTED HOMESTEAD—OCCUPANCY.

COLGROVE *v.* CRITTENDEN.

Town lot claims based upon conveyances from a homesteader, who commutes his entry for townsite purposes, terminate necessarily with the cancellation of the entry.

The claim of one who holds a certificate of occupancy will not be recognized where it is apparent that his occupancy is a mere pretense.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (E. E. W.)

The land embracing lot 16, block 49, in El Reno, Oklahoma, was first entered as a homestead by John A. Foreman, May 11, 1889, and by him leased to the Oklahoma Homestead and Town Company on the 20th day of the same month. This company caused the land to be surveyed and platted as the townsite of El Reno, and on the 25th of June, 1890, it leased lot 16, of block 49, to C. D. French, trustee, who immediately assigned the lease contract to the contestee, T. T. Crittenden. On the 28th of May, 1891, Foreman commuted his homestead entry to a cash entry for townsite purposes, and on the 10th of February, 1892, he gave Crittenden a warranty deed for the said lot 16. On the 29th of April, 1892, Foreman's entry was cancelled, and on the 22d of May following the land was entered as a townsite by the townsite board. On the 24th of April, 1892, Colgrove enclosed the lot with two others in a weak, badly constructed wire fence, and procured a certificate of occupancy from the provisional board of the town. This fence was loosely put up, and consisted in some places of two wires, and in some places of only one. Neither of the parties was ever an actual occupant of the lot, either in person or by tenant, and they base their respective claims entirely upon the facts above stated.

Two members of the townsite board found for Crittenden, and one for Colgrove, and Colgrove appealed. The General Land Office reversed the judgment of the townsite board, and held that neither of the parties was entitled to deed, and then they both appealed.

Foreman's deed to Crittenden, his lease to the Oklahoma Homestead and Town Company, and that company's lease to Crittenden, as assignee of French, all fell with the cancellation of his entry, and as Crittenden had never improved or occupied the lot, his claim was left with no foundation whatever to stand on.

Colgrove's claim is also insufficient. His fence, if fence it may be called, was a palpable pretense, and not improvement and occupancy within the meaning of the statute.

The decision of the General Land Office is affirmed.

TOWN LOT CONTEST-RESERVATION.

KELLY ET AL. v. HILL.

One who enters the Territory of Oklahoma prior to the time fixed therefor is thereby disqualified as a town lot claimant in said Territory.

Town lots may be reserved for public use as sites for public buildings where the necessity therefor is duly shown.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895.. (G. B. G.)

I have considered the consolidated cases of R. Ellis Kelly and T. P. Shumake v. P. J. Hill and R. Ellis Kelly and J. N. Clark v. James T. Hill, involving lots 40 and 41, block 43, Oklahoma City, Oklahoma Territory, on appeal of P. J. Hill and James T. Hill from your office decision of March 4, 1894, denying the right of said parties to deed for said lots. Originally the plaintiffs, T. P. Shumake, R. Ellis Kelly and J. N. Clark were parties in interest, but they have now been eliminated from the contest and present no interest for adjudication by the Department. Your office decision referred to disqualifies the said P. J. Hill and James T. Hill for the reason that they entered the Territory of Oklahoma in violation of law and the President's proclamation, and this is the only issue made on appeal. The evidence is unsatisfactory and conflicting. The decision of the townsite board and the decision appealed from both find as a fact that P. J. Hill and James T. Hill entered said Territory prior to noon of the 22d of April, 1889, and from a close and careful examination of the evidence I concur in this finding of fact. In addition to this, it is the policy of the Department not to interfere with the concurring decisions of your office and the local office on finding of facts, unless they are clearly erroneous.

I find in the record a petition of Oklahoma City, asking to be made a party to said suit, and alleging that said lots 40 and 41 are reserved for public purposes. The authority for such reservations is section 4 of the act of May 14, 1890, entitled "An act to provide for townsite entries of lands in what is known as Oklahoma and for other purposes." Said section is as follows:

That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal govern-

ment of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

It appearing that said lots are situated on one of the main corners in said city, and are needed for the purpose of erecting thereon public buildings for the use of the city, and that the city has no other lands on which to erect such public buildings,—they being a matter of public necessity—the petition of the city is allowed, and the decision appealed from is hereby affirmed.

TOWN LOT CONTEST—COMMUTED HOMESTEAD—OCCUPANCY.

FERRIS v. COVETTE.

A town lot claim resting on a deed from a commuting homesteader must fail with the cancellation of the entry.

A lease or contract from a townsite company will not support a claim for a town lot where it does not appear that said company has any right to convey said lot, or actual interest therein.

A deed for a town lot can not be secured by payment of the taxes thereon.

Actual occupancy of a town lot, with valuable improvements thereon, at the date of the townsite entry, entitles the occupant to a deed.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (E. E. W.)

This is a contest for deed to lots 2 and 3, of block 98, in El Reno, Oklahoma. The lands embracing these lots was entered as a townsite by James Thompson on the 26th of December, 1890, and the lots in question were conveyed, or attempted to be conveyed, by Thompson to the contestant, W. S. Ferris, by deed dated December 29, 1891. Ferris seems to have been then, and to be now, a resident of Mississippi, and never to have occupied or improved the lots, or to have lived in Oklahoma. On the 18th of April, 1892, one M. F. Ferry established residence upon the lots, and improved and lived upon them until the 17th of February, 1893, in conjunction with the contestee, M. J. Covette, who established residence on them in July, 1892.

On the 13th of January, 1893, Thompson's townsite entry was cancelled by the Department, and in the same month the land was entered as the townsite of El Reno. On the 16th of February Ferry executed a deed for his interest in the lots to the contestee, Covette, and on the 17th of February, 1893, Covette applied for deed, alleging his deed from Ferry, and also actual personal occupancy of the lots, and improvements on them to the value of \$2000. On the 11th of March following Ferris also applied for deed, alleging his deed from Thompson, and also a lease or right of purchase from the Oklahoma Townsite and Homestead Company, and payment of taxes on the lots in January, 1893, for the year 1891. On the 18th of April, 1893, the townsite board issued

notices for a hearing of the contest thus formed on the 18th of the following May. On hearing the case, two members of the townsite board decided in favor of Ferris, the other one rendering a dissenting opinion in favor of Covette. Covette appealed, and the General Land Office reversed the majority decision of the board and affirmed the decision of the minority. Then Ferris appealed to the Department.

There was no error in the decision of the General Land Office appealed from. The majority decision of the townsite board was erroneous, and the minority decision was properly affirmed. The proof does not show that Ferris was ever a resident of Oklahoma, and he does not even allege that he ever occupied or improved the lots. On the contrary he seems to rely solely on the strength of his deed from Thompson, his lease or contract from the Oklahoma Townsite and Homestead Company, whatever that may be—for he does not show what it is—and his payment of taxes in January, 1893, for the year 1891. Neither of these three bases of claim, nor all of them combined, entitles him to deed. The payment of the taxes on the lots did not, for as shown by the record the land was not at that time subject to taxation, and even if it had been, such payment alone would not support his claim for deed. And his lease or contract with the Oklahoma Townsite and Homestead Company entitles him to take nothing, because it nowhere appears that that company had any right to lease or convey the lots, or had any interest in them whatever. Neither could he take anything under his deed from Thompson, for as shown by the record, Thompson's entry of the land has been cancelled by the Department, and, of course, his deed to Ferris failed with that cancellation.

The contestee, Covette, shows a good right to deed. The record shows that he and Ferry were joint occupants of the lots, and had valuable improvements on them at the date of the townsite entry, and Ferry testified that he had conveyed all of his interest to Covette, as shown in a deed attached to the application, and that Covette was the actual occupant of the lots, and had valuable improvements on them, at the date of the townsite entry. This proof is sufficient to entitle Covette to deed. *Bender v. Shimer*, 19 L. D., 363.

The decision of the General Land Office is affirmed.

MALLET *v.* JOHNSTON ET AL.

The order for a rehearing made herein June 18, 1892, 14 L. D., 658, revoked by Secretary Smith March 28, 1895, it appearing that the only parties to be benefited thereby have now no interest therein.

CONTEST PROCEEDINGS—SECOND CONTEST.

TITUS v. COLLIER.

A contest dismissed for want of due service of notice on the defendant is no bar to a second suit by the same party against the entry in question on the same grounds as set forth in the first.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (E. M. R.)

This case involves the SE. $\frac{1}{4}$, Sec. 35, T. 109 N., R. 66 W., Huron land district, South Dakota, and is before the Department upon appeal from your office decision of August 8, 1893, refusing to allow George M. Titus to contest the entry of Joseph Collier.

The record shows that Joseph Collier made timber-culture entry upon the above described tract December 23, 1883, and that on June 3, 1893, George M. Titus filed his application to contest, alleging, in substance, that in the years 1890, 1891, and 1892, the entryman failed to cultivate and protect the trees he had planted, in consequence of which they had died, except about five hundred, and that no replanting had been done.

It seems that on March 13, 1893, Titus filed an application of contest alleging about the same, in substance, that he now alleges and a hearing was ordered on June 8, 1893, at which the defendant moved to dismiss for want of sufficient service of notice. This was done and Titus failed to put in an appearance.

Your office decision refused to allow this second affidavit of contest, holding that it was in substance the same as the one just submitted. From this decision Titus appeals.

I do not concur in this disposition of the case. The former application to contest was dismissed for want of service, consequently, this Department never acquired jurisdiction of the parties and there has been, in law, no former trial at issue between these parties. The case as presented now should be disposed of without reference to the former application to contest, and in disposing of it no attention will be paid to the proceedings had prior to the filing of the second application to contest. If the former case had been dismissed for failure to prosecute, a different question would have been presented, but having been disposed of for the reason already given the conclusion can not be avoided that your office decision was in error, and that a hearing should have been ordered to pass upon the question raised by the affidavit of contest.

SOLDIERS ADDITIONAL CERTIFICATE OF RIGHT.

JOHN M. RANKIN.

21 The act of August 18, 1894, does not protect the purchaser of a soldier's additional certificate of right, where said right of the soldier has been satisfied by the prior issuance of a certificate.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 28, 1895. (F. W. C.)

I have considered the appeal by John M. Rankin from your office decision of November 17, 1894, holding for cancellation the soldiers' additional homestead entry, final certificate No. 3214, Pueblo series, Colorado, made by said Rankin as attorney in fact for one Ole Torgerson on August 23, 1894, covering lot 1, Sec. 4, T. 16 N., R. 69 W.

From the statement of facts contained in your office decision it appears that Ole Torgerson on January 7, 1867, made homestead entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 24, T. 113 N., R. 21 W., at the St. Peter land office, Minnesota, upon which entry final certificate was issued May 11, 1869, which entry was duly patented.

On September 10, 1878, W. C. Hill made application in behalf of Torgerson for the issuance of a certificate of additional right, which application was rejected November 15, 1878, and on November 20, 1879, the register at New Ulm, Minnesota, forwarded a new application by Torgerson for the issuance of a certificate of additional right which application was granted, the certificate duly issued and forwarded to the local office on January 16, 1880.

Due to a mistake in the posting of your office records a proper notation of the issuance of said certificate of additional right was not made, and on February 23, 1889, Mr. L. D. Stone, on behalf of Torgerson, made application for the issuance of a certificate of additional right of entry and on March 1, 1889, a second certificate of additional right was issued in Torgerson's name.

Mr. Rankin, who it appears was at the time of issuance of said certificate acting as attorney for Mr. Torgerson, purchased of said Torgerson the right of entry under the second certificate issued March 1, 1889.

It appears that soon after the issuance of said second certificate your office discovered the error, and understanding that it was in the possession of Mr. Rankin, on March 23, 1889, he was advised of the duplication and requested to surrender the certificate, which request he failed to comply with and on August 23, 1894, made the entry in question under said second certificate of additional right.

In your office decision it is stated:

A note is made opposite the entry of this certificate (referring to the first certificate of additional right, issued January 16, 1880), showing that it has been located, but as the proper notes were not made on the tract books, the entry of the exact tract of land entered thereunder can not be traced.

In the contention before your office Mr. Rankin claimed that his entry was confirmed by the act of August 18, 1894, which provides:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office, under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

But your office decision held that

Said act does not validate a soldier's additional homestead certificate which was illegal at its inception, or which was found invalid for any other reason than an attempted sale or transfer, but it only declares that such a sale or transfer should not operate to invalidate any such certificate and that such certificate should be held and taken as valid, notwithstanding such sale or transfer.

In his appeal Mr. Rankin claims that the evidence furnished by your office records on the issuance of a certificate prior to the one under which the entry in question was made is not sufficient upon which to base a finding that such a certificate was in fact issued, but with your office letter of December 5, 1894, which is subsequent to the transmission of the record upon the appeal by Mr. Rankin, the entry papers based upon the location of the first certificate are forwarded showing that final certificate No. 1190, issued from the Duluth land office, Minnesota, on October 15, 1885, for lot No. 8, Sec. 30, T. 63 N., R. 11 W., is based upon the first certificate of additional right issued in Torgerson's name on January 16, 1880.

This clearly establishes the fact of the issue of the first certificate and its location in satisfaction of the full right in Torgerson. It is claimed, however, that if such a certificate was issued and located it was a fraud upon the right of Torgerson as the same was not made by him or at his instance. This branch of the case will receive consideration later on.

It is further claimed that even to admit that the last certificate was invalid and issued without authority, yet that the same is confirmed in the hands of a *bona fide* purchaser by the provisions of the act of August 18, 1894 before quoted, and the act of March 3, 1893 (27 Stat., 593) is referred to as strengthening the position advanced in support of the entry in question.

Said act of March 3, 1893, provides:

That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such pur-

chase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public lands through the location of any such certificate.

It will be noticed that said legislation was directed toward validating entries already made or initiated prior to the passage of said act, based upon certificates of additional right which were invalid from any cause, and by said legislation the purchaser under such invalid certificate upon which entry had been made was permitted to perfect title to the land entered by making payment of the government price therefor.

It must be remembered that the transfer of certificates of additional right is prohibited by law, and while the act just referred to provides a means by which entries made before its passage, based upon certificates of location, for any reason invalid might be perfected, yet outstanding certificates of location which had been sold were for that reason invalid, and even though the certificate may have been regularly issued and in all respects valid, and the transfer made in good faith, yet under the laws as they then stood, said purchaser was not authorized to make entry by reason of such certificate of additional right, and it was evidently the purpose, and the sole purpose, of said act of August 18, 1894, to give recognition to what had been a common custom for years, namely, a transfer of these certificates of additional right of entry, and made the same valid in the hands of *bona fide* purchasers for value.

In the case of entries made upon invalid certificates the act of 1893 requires the purchaser to make payment therefor, in order to perfect title, at the government price, and I can find nothing in said act of 1893 which in anywise strengthens the position taken by appellant in the case under consideration.

In support of this position, however, several decisions of this Department in the matter of the location of military bounty land warrants are referred to, but they do not, in my opinion, strengthen appellant's case. In the case of military bounty land warrants this Department has repeatedly held that the faith of the government is pledged to the extent declared on the face of the warrants and that the carelessness or mistakes of public officers should work injury only to the government which employs them and not to persons who act and invest their money upon the proper assumption that the business of the government is accurately transacted, and where warrants have been issued erroneously and transferred, the same have been respected.

It must be remembered, however, that the military bounty land warrants are upon their face transferable and it is for this reason that the rights of those who purchase upon the faith of the warrant issued by the government are respected. In the matter of certificates of additional right of homestead entry, which have always been held not to be assignable, the reason upon which is based the holding in the matter of invalid warrant locations is lacking.

When Mr. Rankin made purchase of the certificate of additional right of entry in question he must have done so with full knowledge that the same was made in violation of law and therefore invalid, and while he might have bought believing that the certificate had been regularly issued, and that the party in whose favor the same was issued, was duly entitled thereto, yet if the additional right had been fully satisfied by reason of the issuance of a prior certificate he would not be entitled to protection under the provisions of the act of August 18, 1894.

It having been claimed, however, that the first certificate was a fraud upon the government and as the entry based thereon together with the certificate, has, since the rendering of your office decision, been found, I have to return herewith the papers affirming your office decision so far as the construction of the act of 1894 is concerned, and to direct that proper investigation be made to the end that the validity of the first certificate issued in Torgerson's name may be determined.

CONTEST—CHARGE—PAYMENT OF COSTS.

COLLINS *v.* PRUNTY.

An affidavit of contest is insufficient if it does not set forth the continuance of the alleged default.

The local officers have authority to require the contestant to pay the costs, or deposit a sum to cover the same, and dismiss the contest upon refusal to make such payment or deposit.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (I. D.)

The contestant in the case of James T. Collins *v.* Nora E. Prunty, appeals from your office decision of September 23, 1893, wherein you dismiss his contest against defendant's timber culture entry for the SW. $\frac{1}{4}$ of Sec. 25, T. 123, R. 59, Watertown land district, South Dakota.

January 9, 1893, Collins filed his contest against said entry charging "that the said Nora E. Prunty had not cultivated said tract of land as is required by law, and in fact has not cultivated it at all during the year 1892," and asking "that said timber culture entry may be declared canceled and forfeited to the United States, he, the said contestant, paying the expenses of such hearing."

Hearing was fixed for 9 a. m., May 29, 1893, at which time both parties appeared, when the defendant moved to dismiss the contest for insufficiency of the allegations of the default. This motion the local officers overruled, when the contestant filed a motion for continuance, with affidavit in support thereof, and thereupon the local officers ruled that the contestant should pay the costs made up till that day, or make a deposit therefor by four o'clock p. m., which the contestant refused to do, and upon such refusal and because thereof, the local officers dismissed the contest.

The affidavit, itself, was insufficient in not stating that the default continued at the date of the affidavit and the motion to dismiss on that ground should have been sustained.

Under rules of practice 54 and 58, and under the decision in the case of *Barbour v. Bonney* (14 L. D., 299), and other cases, the local officers have full authority to require payment of costs, or a deposit, to cover the same and to dismiss the contest upon a refusal to make such payment, or deposit.

Your office decision is affirmed and the contest is dismissed.

APPLICATION TO CONTEST AN ENTRY—VACANCY IN LOCAL OFFICE.

SMITH *v.* MCKERRACHER ET AL.

An application to contest an entry sent by mail to the local office during a vacancy in the office of the register, and there remaining unacted upon during said vacancy, is properly held subject to a similar application presented by another party on the opening of the office to business.

Secretary Smith to the Commissioner of the General Land Office, March 28, 1895. (I. D.)

Smith, the contestant in the case of *Smith v. Daniel McKerracher* and *Joseph Hale*, appeals from your office decision of June 17, 1893, wherein you hold Hale's contest against McKerracher's homestead entry for lots 3 and 4, Sec. 28, and lots 1 and 2, Sec. 33, T. 10 N., R. 5 E., Oklahoma land district, Oklahoma Territory, prior to the contest of Smith.

October 5, 1891, McKerracher made homestead entry for said land.

March 18, 1892, the register at said local office resigned and there was a vacancy in the office of the register until April 18, 1892, on which last date the new register took charge.

Without quoting fully from the statement of facts, briefly these are the essential points: during the said thirty days the receiver kept the office opened to allow people to examine the records, but the office was closed to all business. During all the time the office was so closed to business, contest affidavits were received daily by special delivery; these were placed in the safe but were not opened nor was the date of the receipt marked.

On the morning of April 18, 1892, there were over one hundred persons in line waiting to file contests and applications.

The report of the local officers says:

At nine o'clock promptly we opened the doors of the office intending to intersperse the filings of contest by the parties outside with those received by mail. . . . One of the first parties to enter the office on the morning of the 18th was James Smith, or his attorneys Clarke and Burwell, who filed affidavit of contest No. 995, against the entry of Daniel McKerracher. . . . Later in the same day the attorneys for Joseph Hale called our attention to the fact that said Hale had a contest affidavit in the office sent by mail and desired that the same should be placed of record.

We found this affidavit among the many in our hands, which up to that time he had been unable to place of record, and gave it contest docket number 1021.

May 3, 1892, Hale moved that his contest should be given priority and the number of his affidavit and that of Smith be reversed. The register granted this motion, but on August 15, 1892, that order was vacated and the cases restored in their order by the joint action of the register and receiver and the Smith contest was set for hearing.

On the day set for hearing the Smith contest was dismissed on motion of McKerracher for alleged defective service. From that action in dismissing Smith's contest he appealed and on the correctness of that dismissal your office decision says (after finding that Hale's contest has priority):

In view of this ruling it is unnecessary to consider the appeal of Smith from your action dismissing his contest on account of alleged defective service, further than to hold that his contest should be re-instated and held to await the final determination of Hale's contest which has precedence by reason of priority.

In passing upon the question of priority, your office decision says:

It appears Hale's contest had been received by mail sometime prior to, and was in your office on, the morning of April 18, 1892, when Smith's contest was offered. Since an affidavit of contest may be transmitted by mail as well as presented in person by the contestant, or his attorneys, and if transmitted by mail is supposed to be filed immediately upon its receipt in your office, and takes precedence of a contest subsequently presented, it must be held that Hale is the prior contestant.

In *Armstrong v. Miranda* (14 L. D., 133) it was decided that—

A vacancy in the office of either the register or receiver disqualifies the remaining incumbent for the performance of the duties of his own office during the period of such vacancy. A relinquishment sent to the local office during a vacancy in the office of the register is not filed in contemplation of law, and if returned to the entryman before said vacancy is filled no action could be subsequently taken by the register and receiver.

The Department says in the last cited case, on page 138:

As already stated the relinquishment in question was received at the local land office while the vacancy in the office of the register existed and while the machinery of the office was stopped and it was, therefore, never filed therein.

Following that view, the application and affidavit of contest sent to the office during the vacancy could obtain no priority or standing because, during the vacancy, there was no office to which contests or applications could be presented. *Graham v. Carpenter* (9 L. D., 365). In *Paris Meadows* (9 L. D., 42), it was held:

Said decision held that the filing made by Meadows in 1875 was void because presented to and accepted by the receiver instead of the register of the local land office and that it was, therefore, no bar to his (Meadows) second filing.

That was in the temporary absence, merely, of the register. It is true that on page 44 of that case this is somewhat modified by stating:

On the other hand I have no doubt that when a paper is presented to and received by the register, receiver, or an authorized clerk, and is duly made of record as a declaratory statement and placed upon the proper files, it is then within the meaning of the law filed, not only in the office but with the officer to whom the law directs it: Provided, the two offices of register and receiver are then filled.

In Christian F. Ebinger (1 L. D., 150), the Department held:

I affirm your decision that Ebinger acquired no right by presentation of his application during the vacancy in the office of receiver, and, hence, the tract was vacant and unappropriated at the date of Hearl's application, and subject thereto.

In the case of Williams v. Loew (12 L. D., 297), it was held that:

An application to enter, filed during a vacancy in the register's office is in contemplation of the law submitted for official action when the vacancy in said office is filled.

But in that case it appears that—

By letter of your office dated May 3, 1887, the acting register was informed that his term of office as register had expired, but he was appointed temporary clerk and authorized to take charge of the books and papers, receive applications to enter land as they might be presented.

It is, therefore, held that Smith's contest was properly filed first by the local officers and has priority over Hale's contest which was properly filed later the same day upon request of his attorney.

Your office decision is modified as herein indicated and the papers are returned to your office for such further proceedings in the contest of Smith as may be necessary. You will give notice of this decision to all parties to this contest.

RAILROAD LAND—SECTION 5, ACT OF MARCH 3, 1887.

UNION PACIFIC RY. CO. v. NORTON.

An adverse settlement claim acquired after a purchase from a transferee of a railroad company does not defeat the right of such purchaser to perfect title under section 5, act of March 3, 1887.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 28, 1895. (J. L. McC.)

On September 21, 1893, the Department rendered a decision in the case of the Union Pacific Railway Company v. Michael F. Norton, involving the SW. $\frac{1}{4}$ of Sec. 3, T. 4 S., R. 69 W., Denver land district, Colorado. (See 17 L. D., 314.)

The tract in controversy was situated within the limits of the grant to the railway company named. The company on July 21, 1874, sold the same to Horace A. Gray and Peter G. Bradstreet; Gray conveyed his interest to Margaret P. Evans; Bradstreet and Evans subsequently transferred their interest to John S. Stanger, who enclosed the land with a fence, and cultivated a part thereof.

On June 12, 1885, Michael F. Norton applied to make homestead entry of the land. His application was rejected because of the claim of the railroad, and he appealed to your office. Meanwhile, on April 26, 1889, Bradstreet and Evans applied to purchase the land under the act of March 3, 1887 (24 Stat., 556), for the benefit of their transferee (Stan-

ger); and on December 18, 1889, Stanger applied to purchase under the act of August 13, 1888 (25 Stat., 439).

Your office, on June 18, 1891, considered the respective claims of Stanger and Norton. It held that certain pre-emption filings excepted the tract from the operations of the railway grant, rejected the applications to purchase by Stanger or for his benefit, and allowed Norton's homestead application.

The railway company appealed to the Department. While the appeal was pending, Stanger withdrew his application to purchase under the act of August 13, 1888, so the only question in issue is as to the applicability of the act of March 3, 1887 (*supra*).

The Department, on September 21, 1893 (17 L. D., 314), held that the application to purchase should be granted; that it was not prevented by the first proviso of the act, because at the date of sale by the railway company (July 21, 1874), the tract was not "in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws;" nor by the second, because it had not been "settled upon subsequently to the first day of December, 1882;" for "Norton is not a settler on this land, but relies solely upon his application to make a homestead entry, made July 12, 1885."

Norton filed a motion for review, which was overruled by departmental decision of December 19, 1894 (19 L. D., 524).

Counsel for Norton has filed a petition for re-review, and for cause assigns the following error:

Error in failing to consider the affidavits filed on the motion for rehearing, which showed that Norton's failure to take up actual residence on the land in controversy (which was the ground of the rejection of his claim to the land) was because of force, and the threats of the adverse claimant, Stanger.

I find in the record the affidavit of said Norton, stating (*inter alia*):

That he went to said land in July, 1885, to make arrangements for the erection of his house, accompanied by Cornelius O'Neill, when he met there John S. Stanger, who threatened to kill him should he attempt to come upon said land; . . . that Cornelius O'Neill, James Galena, and Frank A. Olney, informed him of threats made by Stanger against him.

The only corroboration of the above statement is the affidavit of W. J. Winters, who says:

That in the month of July, 1885, the above-named Michael F. Norton applied to him for a loan of money to erect a dwelling-house and barn upon the above premises; but that, owing to threats alleged to have been made by one J. S. Stanger, who claimed to have purchased said tract from the Union Pacific Railway Company, the said Michael Norton was deterred from establishing a residence upon said land.

The above affidavit, it will be observed, is not made by the person who was present when the threats were made, nor by one of the three who informed Norton of such threats, but by one who, on the contrary, appears to have been told of such threats by some third party—possibly by Norton himself; certainly his language does not indicate any

personal knowledge in the premises. So the only thing before the Department bearing upon the subject is Norton's uncorroborated affidavit.

But even if the statements contained in Norton's affidavit were thoroughly corroborated, and accepted as true, it would not alter the case. Prior to the time when he applied to make entry of the tract Stanger had purchased it from the transferees of the railway company, had enclosed it with a fence, and was in possession of the same under his purchase. The evident purpose of the second proviso to section 5 of the act was to protect persons who had in good faith settled upon and improved the land; but the body of the section having provided that a *bona fide* purchaser from a railroad company, or one taking under such purchase, may perfect title where the claim of the company fails (Union Pacific Railway Company *et al. v. McKinley*, 14 L. D., 237), an offer or attempt to make settlement upon land occupied and improved by a person to whom such right had accrued under said law, would not confer a superior right upon the person offering or attempting to make such settlement, even though the occupant of the tract had prevented him from so doing.

I see no reason for disturbing the departmental decisions heretofore rendered, and the petition for re-review is denied.

LAUGHLIN *v.* MARTIN ET AL.

Motion for review of departmental decision of February 12, 1894, 18 L. D., 112, denied by Secretary Smith, March 30, 1895.

PRE-EMPTION RIGHT—SETTLEMENT.

WILLIAM H. CAYCE.

A settlement on public land does not cause a "pre-emption right" to attach in the absence of an intention to take the land under the pre-emption law.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 28, 1895. (A. E.)

With your office letter of January 11, 1895, was transmitted a motion by William H. Cayce for a review of departmental decision of November 30, 1894. This decision denied his petition for proceedings to determine the title to the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 30, Tp. 15 S., R. 28 W., Camden, Arkansas; and also his request that suit be recommended to set aside the certification of this land to the State of Arkansas for the benefit of the Cairo and Fulton Railroad Company.

The chronological history of this land is as follows:

On February 9, 1853 (10 Stat., 155), Congress made a grant to the State of Arkansas to aid in the construction of a railroad.

On April 22, 1853, one Sarah Nix filed a declaratory statement for the NE. $\frac{1}{4}$ of Sec. 30, Tp. 15 S., R. 28 W., alleging settlement April 1, 1853. On March 31, 1854, Mrs. Nix made pre-emption proof, but the same was returned to the local office for insufficiency, and on November 14, 1854, new proof was taken for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, Tp. 15 S., R. 28 W. In this proof the claimant swore she settled on the land on April 1, 1853, while her two witnesses give the same date of settlement. Mrs. Nix died in 1863.

On August 11, 1855, the route of the Cairo and Fulton Railroad was located, and the land in controversy, which was the remainder of the NE. $\frac{1}{4}$ of the section, for forty acres of which certificate was issued to Mrs. Nix, fell within its geographical limits.

On July 13, 1857, the land in controversy, comprising one hundred and twenty acres, was certified by the Secretary of the Interior, with other lands, to the State of Arkansas, for the benefit of the grant to aid in the construction of the railroad provided for in the act of February 9, 1853, *supra*.

In December, 1884, William H. Cayce applied to make homestead entry of the land in controversy, on the ground that the same was public land because excepted from the grant by the pre-emption claim of Sarah Nix. On November 25, 1887, this Department fully considering the claim of Cayce (6 L. D., 356,) held that in view of the decision of the supreme court in *Nix v. Allen* (112 U. S., 129), the land was vacant at the date of definite location, and passed to the road, and therefore refused to disturb the certificate made to the State in 1857.

On August 15, 1888 (7 L. D., 204), this Department denied a motion for review filed by Cayce. On January 14, 1890 (L. and R., Misc. Letter Book, 189), a motion for review was likewise denied. This was followed by the petition, considered in the letter of November 30, 1894 (L. and R. Misc. Letter Book 297), for a review of which the motion under consideration is made.

In the motion for review under consideration, the petitioner Cayce, to sustain his prayer, makes substantially the following contentions:

First: That the decision of the supreme court, in the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535), rendered May 16, 1892, if applied to the land under consideration, would except the same from the grant to the State of Arkansas.

Second: That being excepted, the certification of the land to the State was erroneous.

Third: Being erroneously certified, it is the duty of the Secretary of the Interior, under the act of March 3, 1887 (24 Stat., 556), to demand a reconveyance of the land from the State, the railroad company, or its assignee.

The land in controversy fell within the geographical limits of the grant by Congress to the State of Arkansas under the act of February 9, 1853 (10 Stat., 155), the granting section of said act being as follows:

That there be, and is hereby, granted to the States of Arkansas and Missouri, respectively, for the purpose of aiding in making the railroad and branches as aforesaid, within their respective limits, every alternate section of land designated by even numbers for six sections in width on each side of said road and branches; but in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval aforesaid, from the lands of the United States, contiguous to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, etc.

It will be seen that there was excepted from this grant all lands to which the right "of pre-emption" had attached. The right of pre-emption attaches when one settles upon public lands with the "intention" of pre-empting it (5th Stat., 453). Had Mrs. Nix intended to pre-empt this land at the date of her original settlement the rule in the Bardon case might be invoked, and the land held to have been excepted from the grant to the State of Arkansas. But such was not the case—for although Mrs. Nix was a settler upon the land as early as 1846, yet she distinctly alleged, and swore, on two different occasions, that her pre-emption settlement began on April 1, 1853.

It should be borne in mind that a mere settlement upon public lands does not cause a pre-emption right to attach, but it must be a settlement with the "intention" of taking the lands under the pre-emption laws. The uncontradicted facts in the record, upon which the Department acted in certifying the land to the State of Arkansas, shows that Mrs. Nix fixed April 1, 1853, as the date on which she formed the intent to pre-empt the land, which was subsequent to the date of the grant, and that she abandoned her application for the land now in controversy. This being true the action of this Department, upon the record thus made, was correct.

It is admitted by counsel for Cayce that Mrs. Nix alleged April 1, as the date of her settlement, but they insist that in fact her settlement for the purpose of taking the land under the pre-emption laws was made in 1846. To support this contention an affidavit by John D. Nix, son of Mrs. Nix, bearing date of August 13, 1894, is produced, in which it is stated that his mother gave April 1, as the date of her settlement under the advice of her counsel, whose idea was to give a date near the date of filing the declaratory statement in order that she might have as much time as possible to pay for the land.

This grant was conferred upon the Cairo and Fulton Railroad company in 1855, by the State of Arkansas, and in 1857 the land in controversy was certified to that State for the benefit of said railroad company.

This action by the Department passed the title of the United States to the railroad company.

In 1880 the corporate limits of Texarkana were extended over the land in controversy. It was divided into town lots, many of which have been sold to different persons, who have valuable improvements thereon, all of which was done upon the faith of the title thus derived from the United States, whose officers and agents acted upon the record made by Mistress Nix. Thirty-seven years after title thus passed from the United States, and thirty-one years after the death of Mistress Nix, the affidavit of her son is filed to show that her pre-emption filing began anterior to the date fixed by her in the record.

The effort of Cayce is to change the effect of that record by this new evidence and to have the Department, at this late date and upon this evidence, demand of the railroad company a reconveyance of this land.

I do not think this evidence sufficient to warrant such action by the Department, and the motion for review is accordingly denied.

SURVEYOR GENERAL—DEPUTY MINERAL SURVEYOR.

ROBERT GORLINSKI.

The action of a surveyor general in suspending a deputy mineral surveyor is subject to the supervisory authority of the Commissioner of the General Land Office, with the right of appeal to the Secretary of the Interior.

Secretary Smith to the Commissioner of the General Land Office, March 30, 1895. (E. W.)

I have considered the appeal of the United States Surveyor-General of Utah, from your office decision of September 26, 1894, in which you reverse the action of the surveyor-general in suspending the commission of Deputy Mineral Surveyor Gorlinski.

It appears that on June 5, 1894, George W. Snow addressed a letter to Deputy Mineral Surveyor Gorlinski, setting out various complaints touching the delays and inaccuracies which rendered the service of the latter unsatisfactory. Closing the said letter the United States surveyor says:

In view of the facts, as stated, it is believed that the public interest will be best subserved by the suspension of your commission as a United States deputy mineral surveyor, and you are therefore informed that no further orders for mineral survey will be issued to you until after the satisfactory completion of the work now in your hands.

From this action of the United States surveyor-general, Gorlinski appealed to your office.

Your office letter of September 26, 1894, considering the said appeal, says, among other things:

The suspension of a deputy mineral surveyor is a matter which should be submitted to this office before final action upon your part. See office letter of September 10, 1894, to the United States surveyor-general of Montana.

Your office letter says further:

In view of all the foregoing, it is suggested that Deputy Gorlinski be restored to duty as a deputy mineral surveyor. Should it appear, however, that work placed in his hands is not executed with reasonable promptness, you will make further report to this office.

From this action of your office the United States surveyor-general appeals, and the matter is now before the Department for consideration upon the question presented in said appeal.

From an examination of this appeal, I am satisfied that the action of the surveyor-general in suspending a deputy mineral surveyor is subject to the supervisory authority of the Commissioner of the General Land Office, with the right of appeal to the Secretary of the Interior. The action of your office in restoring Deputy Mineral Surveyor Gorlinski to duty as a deputy mineral surveyor, with the instructions to the surveyor-general to make further report to your office if his work is not executed with reasonable promptness, is approved, and the papers are herewith returned.

CRANE v. HOWE.

Motion for review of departmental decision of December 11, 1894, 19 L. D., 499, denied by Secretary Smith, March 30, 1895.

RAILROAD LANDS—RIGHT OF INDIAN OCCUPANCY—ACT OF SEPTEMBER 29, 1890.

NATHAN WHEALDON.

Under the treaty of June 9, 1855, the Department is authorized to withdraw from entry such lands as may necessary to protect the Indians in the enjoyment of their ancient fishing privileges, and lands so withdrawn, falling within the limits of the forfeiture act of September 29, 1890, are not subject to purchase thereunder.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 28, 1895. (G. C. R.)

Nathan Whealdon has filed a motion for review of departmental decision of June 9, 1893 (Press-copybook No. 268, pp. 183-7), involving his right to purchase, under the provisions of the act of September 29, 1890 (26 Stat., 496), the lands described as follows: S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 2 N., R. 14 E.; the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 23, T. 2 N., R. 13 E.; the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, same section, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, same township, all in Vancouver land district, Washington.

It appears from the application that claimant went into possession of the lands in 1887 under an agreement or license from the Northern

Pacific Railroad Company, and upon the forfeiture of the company's grant, its road not having been constructed opposite these lands, he applied to purchase the same under the provisions of the forfeiture act.

The decision sought to be reviewed affirmed the action of your office and the local office in holding that the land was not subject to entry because of departmental order of May 25, 1888, directing that "all entries attempted to be made by white men in townships 2 north, range 13, 14 and 15 east, in Klickitat county, Washington Territory," be refused on account of the fishing privileges of Indians in the Columbia river, guaranteed to them by the treaty of 1855 (12 Stat., 951). That order having been modified on May 14, 1892, so as to release from said withdrawal all odd-numbered sections embraced in the original order, except sections 19, 17 and 13, in township 2 north, range 14 east, and section 25, same township, in range 13 east, it was held in the decision complained of that the lands claimant applied for in section 23—namely, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ —were released from the reservation, and his application to that extent might be considered by your office.

Claimant contends at much length that there was no authority for the withdrawal made by the Department, May 25, 1888; that the same was contrary to the provisions of the forfeiture act of 1890 (*supra*), he being in a position, by his application and proofs thereunder, to purchase the lands.

In departmental letter of March 17, 1894, addressed to the Commissioner of Indian Affairs (Misc. copybook No. 280, p. 426), it was held that unless some rights had attached to said lands prior to August 13, 1870, the date of filing the map showing the general route of the Northern Pacific Railroad, the same were reserved on account of the grant for said company, and so continued until the forfeiture act (*supra*), and were, therefore, not in a condition to be again withdrawn in 1888.

There being no data before the Department regarding the rights of the Indians under the treaty of 1855, as to the tracts applied for, the Commissioner of Indian Affairs was directed (May 17, 1894) to cause an investigation to be made to determine the exact location of the grounds in which the Indians have rights granted by said treaty, and whether the allowance of Whealdon's claim (also one Taylor's claim) in any wise interferes with the full enjoyment by the Indians of all privileges granted by said treaty.

In pursuance of this order, Bernard Arntzen, special allotting Indian agent, was detailed to make the investigation. His report, dated July 24, 1894, was transmitted to this Department by the Commissioner of Indian Affairs, who, in his letter transmitting the same, dated February 19, 1895, gives the substance of the evidence taken by the agent, but makes no specific recommendation as to the continuance of the reservation of the lands applied for.

The agent states that he investigated the rights of the Indians in and to the lands applied for by Whealdon, in said section 19 (T. 2 N., R. 13 E.), and section 25 (T. 2 N., R. 14 E.), and finds that the Indians have used said lands in connection with their fisheries ever since the settlement of the country by white people, and that the S. $\frac{1}{2}$ of the S.W. $\frac{1}{4}$ of said section 19 contains an Indian village of many houses, stables, and sheds, and is crossed by the Col-Wash trail leading to the Indian fisheries on the Columbia river. He deems said lands "important and necessary" adjuncts to their fishing rights.

In making the treaty of 1855 (*supra*), "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them," was secured to the confederated tribes. The Columbia river, to the extent in which it runs through the territory ceded, contains the "usual and accustomed places" of fishing. There can be no doubt that the Indians should be protected in the rights guaranteed to them. Were the government to consent to the sale of the lands containing these ancient fisheries, the rights of the Indians guaranteed by the treaty would be necessarily abridged, if not altogether taken away. There can be no question, therefore, of the power, the legality, and the duty of this Department to withdraw from sale and entry the tracts of land containing these fisheries. Nor can it make any difference that patents to lands on the Columbia river containing some of these fisheries have hitherto been issued; on the contrary, there are weighty reasons against the further disposition of such lands lest the rights of the Indians guaranteed by the treaty be all taken away.

Conceding that the lands were granted for the benefit of the Northern Pacific Railroad Company, still the grant having been made subsequent to the treaty of 1855, the company, had it even complied with the provisions of the act making the grant, would have taken the lands subject to the prior existing rights of the Indians, and any grantee of the company would have been charged with the same easement or servitude.

It results, therefore, that, if any of the lands now withheld from entry are needed by the Indians in carrying out the stipulations in the treaty (above quoted), they are not subject to entry.

The agent reports that the lands in question are needful in carrying out the treaty stipulations. That being true, their reservation from sale and entry was properly made, and will be adhered to. It results, therefore, that Mr. Whealdon's application to purchase the lands was properly rejected.

The motion herein must be, and it is hereby, denied.

WINN v. SAUNDERS ET AL.

Motion for review of departmental decision of January 10, 1895, 20 L. D., 3, denied by Secretary Smith, April 8, 1895.

CERTIORARI—RULE 85 OF PRACTICE—PARTY IN INTEREST.

HENRY D. EMERSON.

Rule 85 of practice provides for a period of suspension of the Commissioner's decision, in cases where the right of appeal is denied, but is no limitation on the power of the Secretary to grant an application for certiorari even though it is not filed within said period.

An application for certiorari will be denied where it appears that the applicant is not a claimant for the land involved under any of the public land laws.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (E. M. R.)

This case involves lot 5, Sec. 20, T. 6 N., R. 11 E., Sacramento land district, California, and is before the Department upon application for writ of certiorari by Henry D. Emerson, from your office decision of June 23, 1894, holding that he was not a party in interest, and that he was not entitled to appeal from that decision.

Notice of the above decision was served on the contestant, by mail, on June 29, 1894, and on August 1, 1894, the application for certiorari was filed in the local land office.

The record contains a motion to dismiss the application because not taken within twenty days, as alleged is provided for in rules 83, 84, and 85 of practice.

The motion to dismiss is not well taken.

The suspension of action for twenty days provided for in the rule in all cases in which the commissioner shall formally decide against the right of appeal, simply means that the party is entitled, as a matter of right, to have a supersedeas for that period of time, but it does not bar him from the right to invoke the supervisory authority of the Secretary at any time prior to the execution of the judgment of the commissioner. The Secretary, in virtue of his supervisory power can order an appeal sent up, and such order is likened unto the common law writ of certiorari, which is inherent in all superior courts in respect to the proceedings of lower courts. The Secretary can act on any information that may reach him, whether in a written or oral communication and whether through a party at interest or a stranger to the record.

Rules 83 and 84 prescribe an orderly manner in which a party may apply for an order to send up the record, that is, a writ of certiorari.

Rule 85 provides for the period of suspension of the commissioner's judgment, after he refuses the right of appeal, but it does not in express terms, nor in my opinion by anything like a clear implication, deprive the Secretary of the right, or curtail his power to grant, an order after the expiration of the suspension period.

The applicant takes the chances of having his application heard and granted before the commissioner's judgment is carried into effect. If, before the order applied for is granted the Commissioner carries his judgment into effect, the proceeding can avail the applicant nothing.

In the consideration of this application, however, it appears that on June 30, 1870, the survey of this township by the United States surveyor-general showed the land to be mineral in character.

Henry D. Emerson desiring to obtain title to lot 5, of said section, requested the State of California to select the same as lieu lands for losses under its school grant of March 3, 1853 (10 Stat., 244).

The State advised Emerson that as the lands were mineral they were not subject to selection; thereupon Emerson applied for a hearing for the purpose of disproving the mineral returns. The local officers allowed this, and directed the hearing to be held on December 5, 1893.

On December 4, 1893, Frank Reese applied to make homestead entry of said lot 5, filing at the same time his nonmineral affidavit, and tendering the proper fees and commissions.

On December 5, 1893, Emerson appeared for the purpose of moving that the testimony be taken before a commissioner at Jackson, California, which motion was denied but the case was continued until January 8, 1894.

January 2, 1894, Emerson filed an appeal from your action in denying his motion to take testimony at Jackson. On January 8, 1894, he made default at the hearing and the local officers dismissed his appeal therefore filed, because the decision made was interlocutory and no appeal would lie therefrom.

From this decision Emerson appealed, and your office decision complained of held that he was not such a party in interest as entitled him to appeal from your decision to the Department.

It will be seen that Emerson has made no application to enter this land under any of the public land laws, nor is he here in the position of a contestant. He does not claim the land in any legal manner, and is entitled to no standing before the Department. I am, therefore, of opinion that the petitioner is not entitled to a writ of certiorari.

KIME *v.* SMITH.

Motion for rehearing in the case above entitled (see 19 L. D., 207) denied by Secretary Smith, April 8, 1895.

RAILROAD GRANT—SETTLEMENT RIGHT—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. CO. *v.* JACKSON.

Within the indemnity limits of the Northern Pacific grant the company has no claim, prior to selection, that will defeat the acquisition of a settlement right. An application of a settler to purchase the land settled upon from the railroad company will not preclude his subsequently asserting a settlement right thereto, where the land is then open to such disposition.

An application to enter erroneously rejected, and pending on appeal, is a bar to the subsequent selection of the tract as indemnity.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (F. W. C.)

I have considered the appeal by the Northern Pacific Railroad company from your office decision of July 13, 1894, denying its application for a hearing in the matter of the application by James Jackson to file pre-emption declaratory statement for the NE. $\frac{1}{4}$ of Sec. 25, T. 17 N., R. 45 E., Spokane Falls land district, Washington.

This land is within the indemnity limits of the grant for said company and was included within its list of selections filed March 20, 1884. Prior to this time, to wit, in 1883, Jackson had applied to file pre-emption declaratory statement for the land alleging settlement April 20, 1878.

By your office decision of December 8, 1883, said application was rejected for conflict with the withdrawal made for indemnity purposes, on account of the grant for said company from which action he appealed to the Department, resulting in the decision of November 19, 1888, not reported, which reversed your office decision on the authority of the holding made in the case of the Northern Pacific Railroad Company *v. Miller* (7 L. D., 100).

The company filed a motion for the review of said decision of November 19, 1888, which was considered in departmental decision of December 19, 1893, not reported, and as Jackson had alleged settlement prior to the withdrawal made for indemnity purposes, you were directed to advise the company thereof and dispose of the case as directed in the case of the Northern Pacific Railroad Co. *v. McMahan* (17 L. D., 507).

Acting under said directions the company was duly advised and filed the affidavit of its land commissioner to the effect that Jackson applied to the company to purchase this land on April 9, 1878, and that thereafter his continued occupancy of the same was with intention of purchasing the land of the company.

In the recent decision of this Department in the case of the Northern Pacific Railroad Co. *v. Davis* (19 L. D., 87), the holding made in the Miller case, *supra*, to the effect that, within the indemnity limits, the company has no such claim as would bar the acquirement of a settlement right, until it has made selection in the manner prescribed, was reviewed and adhered to. The company can not, therefore, be held to have had any such claim to the land as would bar a settlement right in this instance, until the presentation of its list on March 20, 1884, prior to which time, to wit, in 1883, the present claimant had applied to file for this land, and as the company had at the time of his application no rightful claim to the land, even to admit that he had prior to this time applied to the company to purchase the land, yet he was free to repudiate the same, the land being at that time open to general disposition under the public land laws, and to make claim under such laws.

The rejection of his application was improper, without regard to the question of previous settlement, as alleged, and said application pend-

ing on appeal was a bar to the company's right to make selection of the land under the indemnity provisions of its grant. Your denial of the company's application for a hearing is therefore affirmed, and you will advise Jackson of his right to complete his filing upon the application made as before described, and thereupon the company's selection will be canceled.

NORTHERN PACIFIC R. R. Co. v. WHITE.

Motion for review of Departmental decision of December 4, 1894, 19 L. D., 452, denied by Secretary Smith April 8, 1895.

DONATION CLAIMS—ACT OF JULY 26, 1894.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 8, 1895.

Registers and Receivers of U. S. District Land Offices in the States of Oregon, Washington, and Idaho,

GENTLEMEN: Your attention is called to the act of Congress approved July 26, 1894 (28 Stat., 122), entitled "An Act Prescribing limitations of time for completion of title to certain lands disposed of under the act of Congress approved September twenty-seventh, eighteen hundred and fifty, and the acts amendatory and supplemental thereto, and commonly known as the 'Donation Act', and for the protection of purchasers and occupants on said lands", a copy of which is hereto annexed.

The first section of said act prescribes a limitation to the time within which final proofs may be made, and their rights to donations of lands perfected by persons claiming lands by virtue of settlement and notification under the provisions of the act of Congress entitled "An Act to create the office of surveyor general of the public lands in Oregon and to provide for the survey and to make donations to the settlers of the said public lands", approved September 27, 1850, and the various acts amendatory and supplemental thereto; and restores to the public domain, on condition of the publication of the notice required by the first proviso thereof, all lands so claimed unless the claimants thereof shall make and file such proofs at the proper land office before the 1st day of January, 1896.

By the second proviso of said section, the rights thereto of persons claiming such donations or parts thereof by virtue of descent, devise, judicial sale, grant or conveyance, in good faith, from the original claimant, if the lands so claimed were on the said 26th day of July, 1894, and had been for twenty years prior thereto in the quiet adverse

possession of such persons or those under whom they claim are recognized; and the issuance of patents to such claimants for such lands is authorized upon their making proof of such claim and possession within the time so prescribed. The object and effect of this provision is, in addition to the recognition of such claims, to obviate the necessity of proving the four years continuous residence on, and cultivation of, such claims by the original settlers, as required by said act of September 27, 1850, (which, in some cases, owing to the lapse of time that has occurred since the entry and settlement of the original claimant was made, it would, doubtless, prove very difficult, if not impossible to establish), if the land has been so occupied during said period of twenty years under such claim of title.

By the third proviso of said section, in case the original claimant of any such donation claim, his heirs, devisees and grantees, as aforesaid, shall fail to make final proof thereof within the time so prescribed, then any person who has exhausted his homestead right and who made settlement prior to January 1, 1894, upon any portion of such claim under an erroneous claim of right, and has since used the same as a *bona fide* residence, will be permitted to purchase, at one dollar and twenty-five cents per acre, not exceeding one hundred and sixty acres, of the land so settled upon and occupied by him; *provided* he shall within ninety days from January 1, 1896, file with the register of the land office of the district in which the land is situate, his own affidavit and the affidavits of at least two disinterested witnesses, establishing the fact of his *bona fide* settlement, occupancy, and improvement of such land.

Section 2 of said act reserves to the Commissioner of the General Land Office the right to allow contests, and to direct hearings, to be instituted in relation to such donation claims, to cancel the same when shown to be invalid and to dispose of the land as a part of the public domain. In such cases you will of course be governed by the rules and regulations applicable thereto heretofore issued or recognized by this Department.

In accordance with the provisions and requirements of said act you are hereby directed to issue, and to publish once a week for six successive weeks, in some newspaper of general circulation published in your respective districts, notices to donation claimants, required by said act, of the form hereto attached; and when so published you are directed to make said notices and the evidence of their publication, matters of permanent record in your respective offices.

The evidence of publication, consisting of a copy of the notice cut from the newspaper, attached to the affidavit of the publisher or proprietor of such paper, showing that the notice was duly published "once a week for six successive weeks" as required by the act; and giving the successive dates of publication, you will transmit to this office; retaining copies for your files.

As no specific provision is made by the act for the expenses necessary to carry the same into effect, the cost of publication, as aforesaid, will be defrayed from the fund set apart for the contingent expenses of your offices.

In case donation claims are sought to be established by proof of four years continuous residence on, and cultivation of, the land so claimed, such proof must be in accordance with the requirements of the law, and of the rules and regulations applicable thereto, heretofore issued or recognized by this Department.

In case such claims are sought to be established by proof of quiet adverse possession for twenty years under *bona fide* claim of right by descent, devise, judicial sale, grant or conveyance from the original claimant, you will require the claimants thereof to furnish proofs in accordance with the following instructions:

1. Those of the present claimants who were in the quiet adverse possession of such claims on the 26th day of July, 1874, and have so continued to hold the same until the 26th day of July, 1894, will be required to make affidavit to that fact, stating therein the material facts relied upon to show such possession, and giving a complete history of the title to their claims from the original settler down to the said 26th day of July, 1894;

2. Those of the present claimants who were not in possession of such claims on the 26th day of July, 1874, but base their claims upon the quiet adverse possession of those under whom they hold, will be required to make affidavit to that fact; stating therein the name of the person so occupying the lands claimed on the said 26th day of July, 1874, and the name of each of his successors in such occupancy during the said period of twenty years, and the respective periods, as near as may be, that the land was so held by each of such successive occupants, the material facts relied upon to show such possession during said period; and giving a history of title to their claims as required by the foregoing instruction number 1.

3. If documentary evidence of the title of such claimants is in existence, the same, or duly authenticated copies thereof must be produced and filed by them.

4. Every material fact set forth in the claimant's affidavit or necessary to the validity of his claim, not established by competent documentary evidence, must be substantiated by the affidavits of not less than two disinterested witnesses having a personal knowledge of the same.

In case application is made under the provisions of this act to purchase such claim, or any part thereof, after the same has been so ascertained to be abandoned, you will require the applicant to produce and file such documentary evidence of his rights in the land claimed as may exist; and to make affidavit setting forth the character and origin of his claim; the date of his settlement; that it was made in good faith

under a claim of right; that it has been so used as a residence from the date of such settlement; the improvements thereon made by him; and that he has exhausted his homestead right, giving the particulars of his previous exercise of his homestead right; and to establish by the affidavits of at least two disinterested witnesses having a personal knowledge thereof, the facts of his *bona fide* settlement, occupancy and improvement of such land, alleged in his own affidavit.

When the proofs herein required shall have been filed in your office, you will proceed without unnecessary delay to examine the evidence in each particular case; and if found by you to be sufficient to establish the title of the claimant, or his right to purchase, as the case may be, under the provisions of the several acts of Congress herein before referred to, you will so state in a certificate, to be made by you and attached to the papers in such case so acted upon. You will then report such case or cases to this office, retaining copies of all papers filed in each case for the files of your office. Proper abstracts of such cases will be prepared and forwarded with your regular monthly returns.

You will proceed at as early a day as possible, to issue and publish the required notice as hereinbefore directed.

Acknowledge the receipt of these instructions.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

NOTICE TO DONATION CLAIMANTS.

U. S. DISTRICT LAND OFFICE.

To all persons having made settlement upon tracts of land within this district, and given notice, as required by law, that they claim such lands as donations, under the provisions of the Act of Congress entitled "An act to create the office of surveyor general of the public lands in Oregon and to provide for the survey and to make donations to settlers of the said public lands" approved September 27, 1850, and the various acts amendatory and supplemental thereto, and to their heirs, devisees, grantees, and all persons making claim to such donation claims whether by descent, devise, judicial sale or conveyance in good faith, who have hitherto failed to make and file in the proper land office final proof of such claims, *Notice is hereby given*, in accordance with the requirements of Sec. 1 of the Act of Congress approved July 26, 1894, and in pursuance of the directions of the Commissioner of the General Land Office, that they are required to appear at this office and make and file final proofs for such claims and perfect their title thereto, before the first day of January, 1896; and that if they

fail so to do within that time, such donation claims will be held to have been abandoned by them, and the lands embraced therein will be restored to the public domain as provided in said Act of Congress of July 26, 1894.

Given under our hands this — day of —, 1895.

_____,
Register.

_____,
Receiver.

[PUBLIC—No. 126.]

AN ACT Prescribing limitations of time for completion of title to certain lands disposed of under the Act of Congress approved September twenty-seventh, eighteen hundred and fifty, and the Acts amendatory and supplemental thereto, and commonly known as the "Donation Act," and for the protection of purchasers and occupants on said lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where persons under the provisions of the Act of Congress entitled "An Act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September twenty-seventh, eighteen hundred and fifty, or the various Acts amendatory and supplemental thereto, have made proof of settlement on tracts of land in either of the States of Oregon, Washington, or Idaho, and given notice, as required by law, that they claimed such lands as donations, but have failed to execute and file in the proper land offices proof of their continued residence on and cultivation of the lands so settled upon and claimed, so as to entitle them to patents therefor, such claimants, their heirs, devisees and grantees shall have, and they are hereby given, until the first day of January, eighteen hundred and ninety-six, the right to make and file final proofs and fully establish their rights to donations of lands under the aforesaid Act of Congress, and no longer; and all claimants who shall fail to make and file final proof and perfect their claims to lands, as donations under the Acts aforesaid, before the said first day of January, eighteen hundred and ninety-six, shall thereafter be held to have abandoned their claims to the lands embraced in their notices: *Provided*, That as soon as practicable after the passage of this Act notices shall be published at least once a week for six successive weeks in one newspaper of general circulation published in the land district, in a form to be prescribed by the Commissioner of the General Land Office, requiring such donation claimants, their heirs, devisees, and grantees, and all persons making claim to such donation claims, to appear and make final proof for such claims within the time herein provided, and that in default of such final proof such donation claims will be held to have been abandoned and the lands embraced therein shall be, and are hereby, restored to the public domain and shall be subject to disposal under the then existing laws providing for the disposition of the public lands: *Provided further*, That where any such donation claims or any part thereof are claimed by descent, devise, judicial sale, grant, or conveyance, in good faith, under the original claimant, and are, at the date of this Act and for twenty years prior thereto have been, in the quiet adverse possession of such heir, devisee, grantee, or purchaser, or those under whom they claim, such heirs, devisees, grantees, or purchasers, upon making proof of their claims and adverse possession as aforesaid, shall be entitled to patents for the lands so claimed and occupied by them: *Provided further*, That where any portion of any such abandoned donation claim shall have been settled upon prior to January first, eighteen hundred and ninety-four, by any person under an erroneous claim of right and has been used as a bona fide

residence by such settler where final proof shall not be made by the original claimant, or his heirs, devisees or grantees, as aforesaid, and such settler has exhausted his or her homestead right, such settler may, within ninety days from the first day of January, eighteen hundred and ninety-six, file with the register of the land office of the district within which the lands are situate their affidavit and the affidavits of at least two disinterested witnesses establishing the facts of their bona fide settlement, occupancy, and improvement of said lands, and pay to the receiver of the proper land office one dollar and twenty-five cents per acre for the land so settled upon, occupied, and improved, not exceeding one hundred and sixty acres, and shall thereupon receive patent therefor.

SEC. 2. That nothing in this Act shall be so construed as to deprive the Commissioner of the General Land Office, under the regulations governing contests in land cases, of his right, if such right now exists, to allow or direct hearings to be instituted to show that a donation claimant has abandoned the lands described in his notice, or prevent the Commissioner, when it is proven that such a claim is invalid or abandoned, from canceling the same upon the official records and thereafter disposing of the lands as a part of the public domain: *Provided*, That where hearings are allowed contestants shall pay the expenses incident thereto in the same manner that costs are paid in other contested land entries; and this Act shall not be construed to affect any case now pending before the Land Department in which final proof has been furnished.

SEC. 3. That the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, shall issue the necessary rules and regulations to give full force and effect to the provisions of this Act. Nothing in this Act contained shall be construed to impair or affect any adverse claims arising under any law of the United States other than said Donation Act, to or in respect of the lands in this Act referred to.

Approved, July 26, 1894.

G. A. BURNS ET AL.

Motion for review of departmental decision of January 19, 1895, 20 L. D., 28, denied by Secretary Smith, April 8, 1895.

HOMESTEAD APPLICATION—RESIDENCE—IMPROVEMENTS.

ABBOTT v. KELLEY.

Pending determination on appeal of the right to make homestead entry an applicant is not required to make settlement and improvement, where his claim rests on his application.

A homestead entryman is not in default in the matters of residence and improvements where the land is covered by the prior uncanceled homestead entry of another who is in possession.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (A. E.)

This is an appeal from your office decision of November 16, 1893, holding for cancellation the entry of H. P. Kelley, made for the NW. $\frac{1}{4}$ of Sec. 13, Tp. 2 S., R. 67 W., Denver, Colorado, on September 11, 1890.

The record shows that Kelley made application to make homestead entry on June 27, 1885, which was rejected because the land was within the grant to the Union Pacific Railroad Company. From this rejection Kelley appealed.

On October 8, 1888, your office decided that the land was excepted from the railroad grant. From this the railroad company appealed.

On June 3, 1889, one Breiding applied to make entry under the act of March 3, 1887, of one hundred and ten acres of the land, as a purchaser. His application was rejected, and he appealed.

On June 24, 1890, this Department decided that the land was excepted from the grant, and your office canceled the company's selection, and directed that Kelley be allowed reasonable time to perfect entry.

On August 25, 1890, however, Frank W. Tunnell was allowed to make homestead entry of the land, and took possession thereof under authority of his entry. On September 11, 1890, Kelley, the first applicant, was also allowed to make homestead entry, though Tunnell's entry was not canceled.

On March 12, 1891, A. F. Abbott, plaintiff herein, filed affidavit of contest against Kelley's entry, charging that Kelley had never improved or established residence on the land. On April 21, 1891, Breiding's appeal was disposed of, denying his application.

On April 22, 1891, a hearing was held, after which the local office found that the charges had been sustained, and recommended that Kelley's entry be canceled. From this Kelley appealed.

On December 19, 1892, your office set aside the proceedings based on Abbott's contest, because when had, consideration of Breiding's appeal was still pending, and judgment in his case involving the land in controversy had not become final. This letter also directed that the entry of Tunnell be permitted to stand, and that a new hearing be held on Abbott's contest. After another hearing, the local office, on July 15, 1893, again recommended the cancellation of Kelley's entry on the same finding as before. From this Kelley appealed, and your office on November 16, 1893, affirmed the local office, and held the entry for cancellation. From this Kelley appealed.

The only question for this Department to determine is whether Kelley's entry should be canceled for not complying with the law in the matter of residence and improvement, while the land was held by Tunnell under a prior entry which your office upheld, though the same was erroneously allowed to remain of record.

This question almost answers itself. When the General Land Office declares an entry shall stand, it can hardly expect an adverse claimant to violate law by forcibly going upon the land segregated by such entry. Kelley could not be expected to go upon land after the rejection of his entry by the local office, because the land was within a grant. Kelley does not appear to have ever claimed under anything but his

application, and pending the determination of the question raised by his appeal, he could not be required to make settlement and improvement. After the allowance of Tunnell's entry, and the taking of possession by the latter thereunder, Kelley could not be expected to go on the land even under his entry allowed subsequently to that of Tunnell's. In law this alleged entry of Kelley's did not exist, and the action of your office left him without any legal right upon which he could stand.

It was the duty of your office to have canceled Tunnell's entry, and put Kelley in possession of an entry by which he could assert his rights. The neglect to do this placed Kelley in a position which prevented him from doing anything other than he did without becoming amenable to the law.

Your office decision is set aside, and you will issue a writ to Tunnell to show cause, within thirty days after service, why his entry should not be canceled and that of Kelley allowed. You will also have a copy of said writ and of this decision served personally upon Tunnell, Kelley and Abbott.

UMATILLA LANDS—COMPLIANCE WITH LAW.

CHARLES O. FANNING.

Under a purchase of untimbered Umatilla land, where the payments therefor are made in time, but the proof with respect to residence and cultivation is unsatisfactory, the entry is not defeated thereby, but should be suspended until such time as the purchaser may furnish due proof of compliance with the law.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (F. W. C.)

I have considered the appeal by Chas. O. Fanning, from your office decision of May 12, 1893, holding for cancellation his cash entry No. 127, made March 30, 1893, for lots 5 and 6, Sec. 8, lots 1, 2, and 3, and the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 17, T. 2 N., R. 32 E., La Grande land district, Oregon.

This land is a portion of the former Umatilla reservation, which was disposed of under the provisions of the act of March 3, 1885 (23 Stat., 340). The second section of said act provides:

The said lands, when surveyed and appraised, shall be sold at the proper land-office of the United States, by the register thereof, at public sale, to the highest bidder, at a price not less than the appraised value thereof, such sale to be advertised in such manner as the Secretary of the Interior shall direct. Each purchaser of any of said lands at such sale shall be entitled to purchase one hundred and sixty acres of untimbered lands and an additional tract of forty acres of timbered lands, and no more. He shall pay one-third of the purchase-price of untimbered lands at the time of purchase, one-third in one year, and one-third in two years, with interest on the deferred payments at the rate of five per centum per annum, and shall pay the full purchase-price of timbered lands at the time of purchase. . . .

And before a patent shall issue for untimbered lands the purchaser shall make satisfactory proof that he has resided upon the lands purchased at least one year and

has reduced at least twenty-five acres to cultivation. No patent shall issue until all payment shall have been made; and on failure of any purchaser to make any payment when the same becomes due, the Secretary of the Interior shall cause said land to be again offered at public or private sale, after notice to the delinquent; and if said land shall sell for more than the balance due thereon, the surplus, after deducting expenses, shall be paid over to the first purchaser.

The tract in question was denominated as an untimbered tract, and was purchased by Fanning, and his payments thereon were made as required by the statute. In accordance with published notice he made proof on March 30, 1893, which was duly accepted, and approved by the local officers and cash certificate No. 127 issued upon the payment of the third installment completing the payment for the purchase of this land.

In this proof the claimant swears that: "My actual residence is on land owned by me adjoining this land. The reason for not building on my said land is that it is a steep, rocky, hill-side and it would be practically impossible to build a house on the land. The land is fenced with a good substantial fence, valued at \$400," and that "it is too steep and rocky to plow and cultivate."

Said proof was considered in your office decision of May 12, 1893, and was held not to be satisfactory, and, as stated therein:

In accordance with the law and instructions thereunder of March 6, 1891 (18 Cops' Land Owner, 21), the final payment and proof of residence and cultivation must be made within two years from the date of purchase. As Mr. Fanning made his purchase on April 10, 1891, as per receipt No. 53, the statutory period has expired without residence on and cultivation of the land by him.

It was for this reason that your office decision held said entry for cancellation from which Fanning has appealed to this Department.

If by said action it is meant to avoid the purchase made by Fanning, for the reason that his proof is found to be unsatisfactory, I must reverse your office decision.

While the law requires that the payments shall be completed within two years from the date of the purchase, yet it is not required that the proof of residence and cultivation shall be made within that period. The law merely prescribes that:

Before a patent shall issue for untimbered lands the purchaser shall make satisfactory proof that he has resided upon the land purchased at least one year and has reduced at least twenty-five acres to cultivation.

While you should refuse to issue patent upon a purchase of these lands until satisfactory proof of residence and cultivation, as required, is shown, yet, if the payments are made within the time required, an entry can not be avoided, and I have, therefore, to direct that Fanning be advised of the rejection of his proof and that said entry be suspended until satisfactory proof is made showing compliance with the law in the matter of residence and cultivation.

Your office decision is accordingly reversed and the papers in the case are herewith returned for action as herein directed.

DESERT LAND ENTRY—SALINE LAND.

JEREMY AND CO. *v.* THOMPSON ET AL.

A desert land entry will not be allowed of land chiefly valuable for the saline deposits thereon, and practically not susceptible of reclamation on account of its saline character.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (I. D.)

On July 8, 1890, Alfred Thompson made application to enter lot 4 of Sec. 18, lot 1 of Sec. 19, T. 1 N., R. 2 W., the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and lot 4, Sec. 13, the NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ and lots 1, 2 and 4, Sec. 24, T. 1 N., R. 3 W., Salt Lake City land district, Utah, which application was rejected by your office June 20, 1893.

On July 7, 1890, James McTernay applied to make desert land entry for the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 18, the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 17, T. 1 N., R. 2 W., same land district, which application was rejected by your office August 5, 1893.

On July 8, 1890, James Barron made application to enter under the desert land act the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 18, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 19, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 20, T. 1 N., R. 2 W., same land district; and on the same day also applied to enter under the homestead law, lot 4, Sec. 12, and lot 1, Sec. 13, T. 1 N., R. 3 W., of the same land district, both of which applications were rejected by your office decision of August 5, 1893.

From the above rejections by your office the defendants in the above entitled cases appeal.

The lands involved are situated on the eastern shore of the Great Salt Lake and as by stipulation the testimony and exhibits in one case will be used in all of the cases the decision in the case of Alfred Thompson will decide the rest.

On June 11, 1890, several of the partners of the firm of Jeremy and Co., together with some skillful civil and hydraulic engineers in the employ of Jeremy and Co., filed affidavits that the land in question was saline land and not possible of reclamation; that it was then and had been for years used for the purpose of trade and business and was not subject to desert land entry.

Upon Thompson filing his application (the protesting affidavits of Jeremy and Company being already on file) the local officers ordered a hearing as to the character of the land at which hearing all parties interested were present.

The testimony is very voluminous and with the exhibits give a clear idea of the character of the land and there is no serious contradiction in the evidence.

The lands in controversy are part of the beach on the eastern shore of the Great Salt Lake and are practically on a level with the present lake level; the highest point having been wholly overflowed with the waters of the lake several times within the memory of the witnesses. This whole tract is sand underlaid with clay and is permeated with the exceedingly saline waters of the Great Salt Lake so that anywhere on the land a hole two or three feet deep strikes the salt water and the entire tract is clearly strongly saline lands.

The serious contention of Thompson is that while a large portion of the tract is covered with quite a layer of salt and salt water, that if certain dams and levees between the land and the lake were removed or cut through, the lands would drain into the lake, and so relieve the tract of saline deposits and that ditches could be cut that would irrigate the tract so the salt and alkali might be washed out and the land made agricultural.

The evidence is very clear, however, that no reclamation is possible at a cost that would justify the outlay at any probable price for agricultural lands in any part of the United States.

The entire tract is permeated by the strong saline waters of the lake so that the retaining dams and levees only appear to prevent the agitation of the salt ponds and thus make more speedy the deposit of salt but without affecting the level of the water from the lake, or either lessening or increasing the per cent. of saline matter.

The evidence is conclusive that the present condition of the tract is strongly saline and that its chief and only value is the vast deposits of salt covering the greater part of it.

This decision is based upon the clearly shown saline character of the lands and the question is not considered as to whether the occupancy of the public lands as appears herein is such occupation for trade and business as exempts it from entry.

Your office decision is affirmed; Thompson's application to make desert land entry is rejected, and the applications of James Barron and James McTernay to make entries of the tracts are also rejected on the same ground.

HOMESTEAD—PRELIMINARY AFFIDAVIT—INDIAN HOMESTEAD.

KRIBS *v.* MILLEN ET AL.

A homestead entry, based on a preliminary affidavit executed before a clerk of court on the false allegation of "distance" from the land office, and filed by mail to secure an advantage over applicants in person, will not be permitted to stand, but must be canceled.

An Indian half-breed may exercise the homestead right conferred by the act of July 4, 1884, on railroad lands forfeited and restored to entry by the act of September 29, 1890.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (A. E.)

The record in this cause shows that on February 23, 1891, the local office at Ashland, Wisconsin, received by mail an application from John D. Hayes to make homestead entry of the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 29, T. 49 N., R. 8 W. Accompanying this application was an affidavit, sworn to before the clerk of the circuit court of Bayfield county, in which Hayes states "that owing to the distance, I am unable to appear at the district land office to make this affidavit." This entry was allowed and placed on record.

On February 25, 1891, Alson E. Kribs applied to make entry of the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 29, Tp. 49 N., R. 8 W., same land district. This was rejected wherein it conflicted with the entry of Hayes, and Kribs allowed thirty days within which to bring a contest.

Kribs thereupon filed an affidavit, claiming to have established settlement upon the land on June 1, 1890, and a hearing was ordered and set for May 25, 1891. Meantime Mary Millen applied to make homestead entry of the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 29, same township and range. This application was rejected, but the local office made Millen a party to the contest, upon her filing an affidavit that she was a settler in good faith upon the land in controversy.

After the hearing the local office found that Kribs was on the land in a speculative way and Millen in the interest of another, and therefore recommended that the entry of Hayes should not be cancelled.

On appeal by Kribs and Millen, your office, on May 28, 1892, reversed the local office, held the entry of Hayes for cancellation, and awarded the right to enter to Kribs. In regard to Millen, your office letter says:

There is also evidence tending to show that she is a half breed Indian, which fact might, if fully established, adversely affect her rights, in the absence of any adverse right thereto, to enter this tract. . . . The testimony, in my opinion, envelopes the latter with grave suspicion, and creates a doubt as to her competency to make an entry of this kind. . . . But your finding as to Mrs. Millen's connection with the tract appears to be sustained by the facts in evidence.

From this Hayes and Millen have appealed to this Department.

The lands involved in this case are part of those within the grant to the Wisconsin Central Railroad Company, forfeited by the act of September 29, 1890.

By the second section of this act, it is provided,

that all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act.

The evidence introduced at the hearing shows that Hayes, the entry man, held a municipal office in Ashland at the time he made his affidavit stating that owing to the distance he could not appear at the land office. This office is said to have been that of Chief of Police. There is also evidence to show that Hayes was in Ashland the day his application was received by the local office.

The evidence further shows that Hayes was on the land before he made his application and saw improvements and knew a settler was claiming the land.

Hayes does not go on the stand at the hearing nor introduce any testimony denying the above facts. In view of the same he can not be regarded as entitled to make entry of this land. It is quite evident that he made this false affidavit and sent it by mail, with the application, in order to obtain an advantage over any person applying on February 23, 1891, the first day the lands were subject to entry at the land office. This action is contrary to the policy of the public land laws, and can not be upheld by this Department. You will therefore cancel his entry.

This leaves the claims of Kribs and Millen alone to be determined.

From his own testimony Kribs built a cabin on the land which he practically completed on July 16, 1890. From that date to the date of hearing he said he was on the land about one-third of the time; that during that period he cleared, mostly during June and July, 1890, about half an acre; that the first part of August he made trips between the land and Iron River, eleven miles distant, but the latter part of the month he stayed at Iron River doing nothing. He did no work on the claim either in August, September, or October, and not to amount to anything from June and July to date of the hearing, while he was on the land but a few days in November, and not at all in December.

In view of these facts, Kribs cannot be considered a settler in good faith, and you will reject his application.

As to Millen, her residence on the land at the date the act was approved is not denied, but your office appears to have presumed that she desires to take the homestead for the benefit of another.

The evidence from which this presumption is drawn does not appear to warrant it, and assertions made regarding the private life of Millen having no connection with the question in issue can not be considered.

It is contended that Millen can not make homestead entry of these lands because she is a half breed Indian.

While it may be true Millen is not entitled to the provisions of the general homestead law, only open to citizens or those who have declared their intention, it can hardly be maintained that, having expended money on her improvements, and being a settler on the land at the date the act was approved, she does not come within its remedial provisions. These provisions give settlers a right to make entry of the land, "under the provisions of the homestead law and this act."

By the act of July 4, 1884 (23 Stat., 96), it is provided:

That such Indians as may now be located on public lands, or as may under the direction of the Secretary of the Interior, or otherwise, hereafter so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads, and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

Under the circumstances existing, you will allow the said Mary Milen to make entry under this act last above cited, and so instruct the local office.

Your office decision is modified in accordance with the views herein expressed.

ABANDONED MILITARY RESERVATION—ACT OF AUGUST 23, 1894.

INSTRUCTIONS.

In the disposal of lands in abandoned military reservations, under the act of August 23, 1894, the time fixed for installment payments authorized by said act, and the interest thereon should be uniform for all reservations opened to settlement under said act.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 9, 1895. (W. H. A.)

I am in receipt of your letter of the 25th ultimo transmitting for my approval instructions to the proper local officers for the disposal of the lands in the Fort Rice, North Dakota, and Fort Bridger, Wyoming, abandoned military reservations.

You call my attention to the variance in departmental letters of February 9, 1895, and February 18, 1895, directing how the payments shall be made for the lands in these reservations respectively and the interest to be charged entrymen on deferred payments.

The act of August 23, 1894 (28 Stats 491), authorizes entries for these lands. So much of said act as is applicable to the question presented by you is found in the proviso to the first section thereof, which is as follows:

That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

For obvious reasons, the time for the payments in installments authorized by said act, and the interest thereon, should be uniform for the lands in all reservations opened to settlement by virtue thereof.

I have to direct therefore that you prepare all instructions to local officers under said act so as to conform to departmental letter of February 18, 1895, as follows:

That the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered on his entry, and that the rate of interest upon deferred payments be charged at the rate of 4 per cent per annum.

It follows that the instructions to the local officers, at Bismarck, North Dakota, must be amended to conform to the above directions; and the same are returned for that purpose.

The instructions to the local officers at Evanston, Wyoming, are herewith returned approved.

ABANDONED MILITARY RESERVATION—FORT BRIDGER.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 9, 1895.

REGISTER AND RECEIVER,

Evanston, Wyoming.

GENTLEMEN: On February 18, 1895, the Hon. Secretary of the Interior approved the report of the appraisers of the Fort Bridger abandoned military reservation. Inclosed find copy of said departmental decision. (See 20 L. D., 118.)

You will observe that entries for these lands are authorized under the act of August 23, 1894, and that the Secretary directs

that the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal annual payments to date from the time of the acceptance of his proof tendered on his entry, and that the rate of his interest upon deferred payments be charged at the rate of 4 per cent. per annum.

A copy of the report of the appraisers has been filed in your office, and upon the request of entrymen you will inform them at what rate per acre the lands entered by them have been appraised.

In allowing entries for the lands in this reservation you will in each case, endorse on the application "Fort Bridger Reservation, Act of August 23, 1894," and make the same notation on your abstract of homestead entries.

Under the provisions of the homestead law, an entryman has the right either to commute his entry after fourteen months from the date of entry or offer final proof under Sec. 2291 R. S. In entries under said act of August 23, 1894, he may, at his option, commute after fourteen months with full payment in cash or, after submitting ordinary

five year final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof, without interest, or he may make payment in five equal installments, the first payment to be made one year after the acceptance of his final proof, and the subsequent payments to be made annually thereafter, interest to be charged at the rate of four per cent. per annum from the date of the acceptance of final proof until all payments are made.

In case the full amount is paid after fourteen months from date of entry you will, if the proof is satisfactory, issue cash certificate and receipt; and in the event that regular final proof is made, and full amount then paid, you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount of the principal and interest paid, reporting the same in a special column of the abstract of homestead receipts, and at the time the last payment is made, you will issue the final papers as in ordinary homestead entries.

In issuing final papers, you will make proper notations thereon, as well as on the applications and abstracts, as before directed, to show that the entry covers land in the Fort Bridger Reservation.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

ISOLATED TRACT—ACT OF FEBRUARY 26, 1895.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 11, 1895.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: Your attention is called to the act of Congress approved February 26, 1895, (Public No. 78), entitled "An Act To amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States," a copy of which is hereto attached.

Hereafter when an application is made to you by any one for the proper proceedings to be entered upon in order that any tract of land may be ordered into market at public sale by the Commissioner of the General Land Office under said section, the applicant will be required to furnish an affidavit made by himself and duly corroborated by two witnesses, setting forth the character of the land; stating whether it is covered with timber or contains stone or any mineral, whether it is agricultural in character, for what purpose the land would be chiefly

valuable, and why he desires the same ordered into market. It must also be shown that the tract is unoccupied by any one having color of title thereto.

It will be observed that no lands are subject to be ordered into market as aforesaid until the same shall have been subject to homestead entry for a period of three years after the surrounding lands have been entered, filed upon, or sold by the government.

Care must be taken in reporting any such application for the Commissioner's favorable action thereon, that your plats and other records do not show the existence of any objection to the offering of such lands under said law. When instructions are received from this office ordering such tract or tracts to be exposed at public sale, you will cause a notice to be published once a week for the space of thirty days in a newspaper of general circulation in the vicinity of the land, using the following form, viz:

Public Land Sale—Notice is hereby given that in pursuance of instructions from the Commissioner of the General Land Office, under authority vested in him by section 2455, U. S. R. S., as amended by the act of Congress approved February 26, 1895, we will proceed to offer at public sale on the — day of —, next, at this office, the following tract of public land, to wit: —.

Any and all persons claiming adversely the above described lands are advised to file their claims in this office on or before the day above designated for the commencement of said sale, otherwise their rights will be forfeited:

_____,
Register.
_____,
Receiver.

(Date.)

The day of sale must be fixed so as to take place at least thirty days after the date of the first publication of the notice. The register will also make proper posting of notice. The sale must close immediately after offering the lands thus advertised; but should any of the lands thus offered not be purchased at the public sale, they will not subsequently be regarded as subject to ordinary private entry unless located within the State of Missouri in view of the provisions of the first section of the act of March 2, 1889, 25 Stat., 854.

The party desiring such offering to be made must first make a deposit of sufficient money to pay the cost of publishing the notice, and all other expenses of the sale, the deposit to be made with the receiver, who will notify the register thereof, that he may cause the notice to be published, but applicants are not to be deprived of the right to make their own contracts for publication of notice, following Rule 5, p. 61, Circular February 6, 1892, in reference to final proof notices.

Such action will, however, give the applicant no preference right over others desiring to purchase the land, as the same must be offered at public sale, and in case of competition must be disposed of to the highest bidder.

You will call attention of the bidder to the affidavit (form 4-102 B), and require such affidavit of the purchaser, modified to conform to section 17, act of March 3, 1891, (12 L. D., 405, and 19 L. D., 299). A non-mineral affidavit (form 4-062), must also be furnished. You will observe that not more than one hundred and sixty acres shall be sold to any one person at the offering under said section 2455.

Immediately after each sale you will transmit to this office a joint report showing the lands offered, indicating the sales, the numbers of the certificates, date of sale, and names of the purchasers.

You will issue the cash papers the same as in ordinary cash entries, and report them in your current monthly returns, forwarding with said entries the affidavit of the publisher, showing the thirty days' publication, together with the Register's certificate of posting.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

AN ACT to amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-four hundred and fifty-five of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"SEC. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell for less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the Government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person."

Approved, February 26, 1895.

SECOND HOMESTEAD ENTRY—ACT OF DECEMBER 29, 1894.

TONYES H. LINNEMANN.

Under the provisions of the act of December 29, 1894, amending section 3, act of March 2, 1889, the right to make a second homestead entry may be recognized when the first is relinquished on account of the arid and unproductive character of the land, successive droughts, and consequent failure of the entryman to secure a crop from the land covered by said entry.

Secretary Smith to the Commissioner of the General Land Office, April 11, 1895. (W. M. B.)

I have considered the appeal of Linnemann from your office decision of May 1, 1893, in the case of *ex parte* Tonyes H. Linnemann, wherein your office rejected appellant's application, of date March 3, 1893, to enter lot 4, Sec. 18, T. 22 N., R. 53 W. (46.15 acres), Alliance, Nebraska, land district, said appellant having previously thereto, to wit: on June 25, 1889, made homestead entry of the NW. $\frac{1}{4}$ of Sec. 11, T. 22 N., R. 54 W., at the Sidney land office.

The record shows that appellant established his residence upon the tract first entered during the month of May, 1889; that he broke ten acres of the tract during said year; that he built a dwelling house and stable on the land during his residence on the tract at a cost of \$200; that he relinquished the tract after having planted a portion of the same to crops for three years, and that said crops were destroyed and turned out to be a total failure, each year, on account of drouth; that the tract is arid land; that it was impossible for him on account of unavoidable causes to secure a support for himself and family by cultivation of the same, for which reason he relinquished his entry of same, being forced to rent other land which would produce crops, in order to support his family.

The facts in this case bring it within the amendatory provisions of the act approved December 29, 1894 (Public—No. 10) in words as follows—

That section three of the said act of March second, eighteen hundred and eighty-nine (Suplt. R. S., Vol. 1, second edition, 682) be amended by adding thereto the following provision: That if any such settler has heretofore forfeited his or her entry for any of said reasons, such person shall be permitted to make entry of not to exceed a quarter section on any public land subject to entry under the homestead law, and to perfect title to the same under the same conditions in every respect as if he had not made the former entry.

Under the provisions of the act above cited, and the one amendatory thereof, which last act was approved subsequent to the date of your said office decision of December 4, 1893, it is hereby adjudged that Linnemann's application to make a second entry for said lot 4, containing 46.15 acres, be allowed.

Your office decision rejecting such application is therefore reversed.

FINAL PROOF—ACT OF MARCH 2, 1895.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 12, 1895.

REGISTERS AND RECEIVERS,

United States District Land Offices in the Territories.

GENTLEMEN: Your attention is called to the act of Congress approved March 2, 1895 (Public—No. 107), entitled "An Act Granting chief justice of United States courts in Territories power to appoint commissioners to take proof in land cases, and so forth," a copy of which is annexed.

The first section of the act empowers the chief justice of the court exercising federal jurisdiction in the Territories to appoint commissioners in the several judicial districts, to be known as United States court commissioners.

Under the second section of said act the commissioners so appointed are empowered and are required on application by proper person, to administer the oaths in preliminary affidavits and final proof testimony required under the homestead, pre-emption, timber culture and desert land laws in their respective districts, in like manner as provided for in reference to United States circuit court commissioners, in the act of May 26, 1890 (26 Stat., 121). The instructions under the act of May 26, 1890 (*supra*), circular of February 6, 1892, page 12, will be a sufficient guide and should be followed in cases arising in your district where affidavits and final proofs are made before a United States court commissioner as provided by this section of the act. And you will require of such commissioner evidence of his official character, and his signature with evidence of the genuineness thereof. Such evidence to consist of a certified copy of his commission or order of appointment from the clerk of the court in which the appointment was made or a certificate from such clerk showing that the person was duly appointed commissioner, and also his certificate as to his signature with his seal of office attached.

When such evidence is received at your office, you will make a note of it for further reference and forward the same to this office.

The third and fourth sections do not appear to call for remark in this communication.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH,
Secretary.

[PUBLIC—No. 107.]

AN ACT Granting chief justice of United States courts in Territories power to appoint commissioners to take proof in land cases, and so forth.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the chief justice of the court exercising Federal jurisdiction in the Territories shall have power to appoint commissioners in the several judicial districts, to be known when appointed as United States court commissioners.

SEC. 2. That said commissioners shall have power, and it shall be their duty on application by proper person, to administer the oaths in preliminary affidavits and final proofs required under the homestead, pre-emption, timber culture, and desert-land laws in their respective districts, in like manner as provided for in reference to United States circuit court commissioners, in the act of May twenty-sixth, eighteen hundred and ninety. Twenty-sixth Statutes at Large, page one hundred and twenty-one.

SEC. 3. That no commissioner shall be appointed who resides within thirty miles of any local land office, nor shall any commissioner be appointed who resides within thirty miles of any other commissioner.

SEC. 4. That this Act shall take effect from its passage.

Approved, March 2, 1895.

OKLAHOMA TOWN LOT—OFFICER.

MILLER *v.* BARNES ET AL.

A purchaser of a possessory interest in an Oklahoma town lot, who is at such time and at the date of the townsite entry receiver of a land office, is disqualified thereby from acquiring title to said lot.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1895. (G. B. G.)

The property involved herein is lot 10, block 47, Guthrie, Oklahoma, and the case is before me on appeal by C. M. Barnes and J. W. Miller from so much of your office decision of April 26, 1894, unfavorable to their respective claims.

The decision of the townsite board awarded a three-fourths interest in said lot to the defendant Barnes, and a one-fourth interest therein to the defendants Orren V. Hays and Ida L. Hays jointly. The decision of your office appealed from, and here complained of, reversed the action of the townsite board, and awarded the three-fourths interest therein to the plaintiff Miller, for the reason, as set forth in the opinion, that "On August 5, 1890, the date of the entry of said townsite, Miller was an actual occupant of a portion of the lot in controversy, under a claim of right, and the claim of Barnes to an undivided three-fourths interest in the same being invalid, said interest is awarded to Miller."

Your office decision further modifies the decision of the townsite board, in that it gives to the defendant Ida L. Hayes alone, the one-fourth interest that had been awarded to the defendants Orren V. Hays and Ida L. Hays jointly.

The question of entering the Territory in violation of law and the President's proclamation, is an issue in this case. But I concur in your office decision, in that it holds that the defendant Barnes is disqualified from acquiring title to public lands in Oklahoma, by reason of his being receiver of the Guthrie land office at the time he became interested in the property in contest, by purchase of a possessory right, at the time said town was entered by the townsite board. The question of "soonerism" need not therefore be considered.

I concur in the conclusions reached by your office, and the decision appealed from is affirmed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

CASTELLO v. BONNIE (ON REVIEW).

Overruled,
22 L.D. 174

Where an entry has been canceled without due notice thereof to the entryman or his transferee, and the land covered thereby entered by another prior to the act of March 3, 1891, and said transferee invokes the confirmatory provisions of section 7 thereof, the claim of the intervening entryman is subject only to the right of said transferee to show that the entry under which he claims was improperly canceled; for if properly canceled it can not be confirmed in the presence of the adverse entry subsisting at the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 12, 1895. (J. L. McC.)

The Boston Safe-Deposit and Trust Company, claiming to be transferee of William Bonnie, has filed a motion for review of departmental decision of October 11, 1892 (15 L. D., 354), in the case of Patrick Castello v. William Bonnie et al., involving the pre-emption cash entry made by the latter for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 59 N., R. 17 W., Duluth land district, Minnesota.

The entry was made August 19, 1882. Upon a report by a special agent of the Department that it had been made in the interest and for the benefit of a lumber company, the entry was canceled on June 15, 1883. Notice was sent to the entryman at his last known post office address, but he did not respond. On August 20, 1883, John Comstock, claiming to be a transferee of Bonnie, applied for a hearing, which was granted, and finally had in November, 1888. On February 8, 1889, the local officers rendered a decision adverse to Bonnie, and recommended the cancellation of his entry. (It had actually been canceled, however, on the report of the special agent, five years and eight months before). From the above decision of the local officers, Bonnie's transferee, Comstock, on March 30, 1889, filed an appeal to your office.

Long prior to the last named date, however (to wit, on July 29, 1885), one Patrick Castello had made homestead entry of the land, and had commuted the same to cash on August 5, 1886.

On March 3, 1891, an act was passed confirming entries of a certain class in the hands of transferees. On June 16, 1891, the Boston Safe-Deposit and Trust Company, claiming to be a mortgagee of the C. N. Nelson Lumber Company, which had purchased the land from Comstock, applied to intervene.

On October 23, 1891, your office held that Bonnie's entry had been canceled illegally (because without notice to him), and should be reinstated; hence that the transferees could properly claim its confirmation under section 7 of the act of March 3, 1891 (*supra*); and furthermore that, as two entries of the same land at the same time were not permissible, Castello's entry must be canceled.

From this decision Castello appealed, contending that Bonnie's entry was improperly reinstated.

The Department on October 11, 1892, affirmed the decision of your office in so far as it held that the cancellation of Bonnie's entry on the report of a special agent, without notice to the entryman, was improper; but held that, as Castello had an entry of record, he should be allowed to show cause why it should not be canceled.

Under a rule laid upon him to show cause as above, Castello made affidavit, on information and belief, that Bonnie's entry was made in the interest of the C. N. Nelson Lumber Company, and that said company was not therefore a *bona fide* purchaser; further, that the Boston Safe-Deposit and Trust Company took its mortgage charged with the knowledge of the fact that Bonnie's entry had been canceled for nearly two years, and that consequently it was not a *bona fide* incumbrancer within the meaning of the seventh section of said act of March 3, 1891, and he asked for a hearing at which he might show that such was the fact.

Your office considered this answer insufficient, and by decision of February 10, 1893, held his entry for cancellation, and denied his application for a hearing.

Castello appealed to the Department, which, on August 11, 1894 (unreported), modified the decision of your office, and directed that the case be remanded to the local office for a hearing upon Castello's allegations above set forth, "and upon any other charge that may be then presented tending to show that Bonnie's entry was properly canceled, and that the entry of Castello was properly allowed."

Now comes the Boston Safe-Deposit and Trust Company, and moves for a review and reconsideration of said departmental decision, in so far as it modified your office decision (of February 10, 1893,) and ordered a hearing.

The controlling question in this case is, whether Castello could acquire a right to the land in controversy, by his entry, in view of the fact that the cancellation of Bonnie's entry was improper, by reason of the failure of the land office to give the prior entryman or his transferee notice of such action. It is conceded that such cancellation without giving

such notice was improper; and to all intents and purposes, so far as the transferee is concerned, it may be considered as an existing entry. But the reinstatement of the entry on the record could give the transferee only such right as he would have had in case notice had been given—to wit, to show that the entry of Bonnie had been improperly canceled. The confirmatory provision of the act of March 3, 1891 was not intended to defeat the rights of a *bona fide* settler who had made entry of the land after the cancellation of a prior entry. Castello's entry, having been made prior to the passage of the act of March 3, 1891, and existing at the date of said act, was subject only to the right of Bonnie's transferees to show that Bonnie's entry had been improperly canceled; and if it had been properly canceled, the act of March 3, 1891, would not confirm it in favor of the transferees so as to defeat the rights of Castello under his entry, subsisting at the date of the passage of the act.

The questions presented by the motion for review were fully considered in the decision sought to be reviewed, and no reason appears for disturbing said decision.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890—HEIRS.

TOBIN *v.* RORKE.

The right to perfect title conferred by section 3, act of September 29, 1890, upon licensees of a railroad company, descends to the heirs of the licensee, and may be properly asserted by the administrator of the decedent's estate for the benefit of the heirs.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895.
(E. E. W.)

STATEMENT.—Lot 4, Sec. 7, T. 6 N., R. 36 E., in the State of Washington, was included in the grant to the Northern Pacific Railroad Company, and in that part that was forfeited by the act of Congress of September 29, 1890. 26 Stat., 496. Patrick Rorke settled on it in 1872, and resided on and cultivated it continuously from that date until 1887, when he died. He was a citizen of the United States, and in his lifetime had two instruments of writing from the Northern Pacific Railroad Company, in which he was given the first right to purchase the said tract of land from that company whenever it acquired title to it. From the date of his death his heirs and legal representatives continued in possession, and were in possession when the said act of Congress was passed, when contestee's homestead entry was made, and also when this contest was initiated. The contestant, Henry G. Tobin, is administrator of the estate of the said Patrick Rorke, and the contestee, John P. Rorke, is his son. He left surviving him his wife and six children. This son John and one daughter are over the age of twenty-one years, and the other

four, two of whom are girls, and one of them feeble-minded, are minors, and their mother also is now dead. On the 22d day of May, 1891, this same son John gave notice in writing, over his own signature as administrator, presumably of the estate of his mother, Bridget Rorke, that the said estate claimed the land in controversy, and would enter and pay for the same within the time allowed under the said act of Congress. The contestant was appointed administrator March 19, 1892, and the contestee made his homestead entry of the land September 30, 1892. The contestant, as administrator as aforesaid, filed application to purchase for the benefit of said heirs February 2, 1893, alleging that they were occupying and in possession of the land under license from the Northern Pacific Railroad Company to their father at the date of the passage of the said act; that prior to contestee's entry they had given notice of intention to purchase; and that his said entry was made with intent to defraud the other heirs. On the trial of the contest the register and receiver held the entry for cancellation, and the contestee appealed. The General Land Office affirmed the decision of the register and receiver, and he appealed to the Department.

OPINION.—Counsel for contestee argues, first, that the contestant, as administrator, has no authority to contest his entry, or to purchase the land; and, second, that the right to purchase, given by the said act of Congress, to the occupants of the forfeited lands, under license from the Northern Pacific Railroad Company, does not extend to the heirs of such licensed occupants who were deceased at the date of the passage of the said act. Neither of these arguments is well taken. It is true that an administrator has no authority to submit final proof of homestead entry. But this case is more nearly analagous to a pre-emption, and in that class of claims administrators had express authority to take all necessary steps to complete the entries of their intestates. In the case of *Reith v. Niles*, 19 L. D., 449, which was similar to this, except that in that the occupant was living when the act was passed, the Department held that:

The right to purchase forfeited railroad lands under section 3, act of September 29, 1890, by persons holding under license from a railroad company, is inheritable, and may be exercised by an administrator for the benefit of the estate, where, under the local law, he is given the control of the real and personal property of the deceased.

And Sec. 1041 of the Statutes and Codes of Washington declares that:

The executor or administrator shall take into his possession all the estate of the deceased, real and personal, and collect all debts due to the deceased.

And the supreme court of the State of Washington has held that "the administrator takes entire charge of decedent's estate, whether it passes to the heir by descent or otherwise", 1 Wash., 104; and that "anything of value susceptible of exclusive possession is property, such as an inchoate title to a pre-emption claim, and should be administered." 2 Wash., 58.

Thus it is seen that the administrator not only has authority to prosecute the contest and purchase the land, but that it is his imperative duty to do it. As to contestee's entry, the testimony is convincing that it was made with intent to defraud the other heirs, and should be cancelled.

The decision of the General Land Office is affirmed. Contestee's entry will be cancelled, and contestant, as administrator, will be allowed to purchase in the name of all the heirs of the said Patrick Rorke. The papers in the case are herewith returned.

SURVEY—MEANDER LINE OF LAKE.

WATSON H. BROWN.

The land lying between a properly established meander line of a lake and the shore line of the water is not unsurveyed land, but forms an adjunct of the adjacent sub-division.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (G. C. R.)

With your office letter "E" of November 29, 1893, is transmitted the appeal of Watson H. Brown from your office decision, dated September 27, 1893, denying his application for the survey of a tract of land alleged to be situated in the northwest corner of Sec. 20, Tp. 25 N., R. 4 E., W. M., Olympia land district, Washington.

It appears that a similar application was made by the same person in 1891, and, upon consideration thereof, your office on October 3d of that year recommended that the application be disallowed, and upon reference of the matter to this Department, the action of your office was concurred in, on January 29, 1892.

As an explanation for this second application, it is alleged that the facts in the case were not properly alleged or presented in the first application, "and were evidently not before any of the officers who investigated the matter."

The area of the tract is only 2.12 acres, and in the application and affidavit it is alleged that this tract lies upon the shore of Lake Union—a navigable body of water—and is about thirteen feet above highest water mark, not subject to overflow, and is fit for agricultural purposes; that the configuration of the shore of the lake has not materially changed since the original survey of the water front of adjacent lands; that said land was at the time the applicant settled thereon covered with brush and timber, there being trees upon said land seven feet in diameter; that the land is bounded on the west by a tangent line, constituting the east line of section 19, township 25 north, range 4 east, established by the United States surveyors, marked by monuments on the ground, and described in the field notes of said surveys; on the north by a tangent line constituting the southern boundary of section 17, township 25

north, range 4 east, and on the east and south by the shores of Lake Union; that he settled on the land May 21, 1888, has continuously resided thereon since that date without interference or objection from any one.

The questions of the area of the land, what it may have upon its surface, the residence thereon of the applicant, and the non-interference on the part of any one in his alleged rights, are immaterial, except in showing his good faith in the presentation of such other facts as may warrant the favorable consideration of his application.

The question is wholly one of jurisdiction. If the land has been surveyed, or if, under the law, it has passed to another, the Department is without power to direct its survey.

In the survey of lands bordering on streams, lakes, etc., it often happens—indeed, it is the rule—that the shore line of the stream, lake, etc., is not identical with the actual or meander line run. The irregularities or sinuosities of the shore lines render an absolute, accurate survey and measurement of the uplands adjacent thereto impracticable, if not impossible. It results, therefore, that there is often a strip of land between the actual line run and the margin of the stream, lake, etc., but it does not follow that the line so run marks the boundary of the lot or tract of land surveyed and measured; on the contrary, such tract extends to the border of the water, and may actually contain a greater (or less) amount of land than the actual survey indicates. If, however, the government survey shows that a line is run without any reference to the shore line, and with no intention of measuring, to the water, the full or approximate amount of the adjacent lands, and a strip is left between such line and the margin of the water, the survey is not complete, and in such case the government may, on discovering the omission or neglect, cause the strip to be surveyed and dispose of it.

Upon the northern border of Union Lake, a body of water of irregular shape and containing an area of two or three square miles, is situated the tract of land survey of which is applied for.

The survey shows a tract of land in the northeastern part of section 19, in said township; this tract has twelve acres, is marked lot 1, and is adjacent to the lot in question, which is alleged to be in section 20.

If the section line between sections 19 and 20, as actually extended, was intended for and actually run as the meander line of the lake, then there is no unsurveyed land left in the northwestern corner of said section 20. True, in running that meander line there may have been small tongues, strips, or projections of land extending eastward into the lake, which would be in section 20; but from the foregoing considerations, such strips or projections are proper adjuncts of lot 1, which, in such case, would have its entire eastern border bounded by the lake, and not by the meander line.

From the field notes of the public survey, your office finds that "both the section and meander lines form the east boundary of lot 1, in section 19."

On a careful re-examination of the field notes, a copy of which is found in the record; also an examination of the field notes of the section line between sections 17 and 20, it is seen that your office is correct.

Without denying the averment that there may be a small strip of land in the northwestern corner of section 20, it must be held that such strip, if any, lies between the meander line of the lake and the lake's margin; that the meander line of the lake coincides with the section line between sections 19 and 20; that the point marking the common section corners of sections 17, 18, 19, and 20 is also the point on or near the lake which is in the line marking its true meander. That being true, lot 1 in section 19 is bounded on the east by Union Lake, and there is no land in the northwestern part of section 20 subject to survey and disposition.

It follows that the decision appealed from is right. The same is, therefore, affirmed.

CAMERON *v.* KLINE.

Motion for review of departmental decision of March 31, 1894, 18 L. D., 317, denied by Secretary Smith April 12, 1895.

CONTEST—HEARING—SETTLEMENT RIGHT.

SOMERS *v.* HEUER (ON REVIEW).

Irregular action of the local office in ordering a hearing should not be permitted to defeat the right of a settler to show the facts with respect to his settlement claim.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (F. W. C.)

I have considered the motion forwarded with your office letter of March 19, 1895, for review of departmental decision of December 13, 1894 (19 L. D., 507), in the matter of the case of Wm. J. Somers *v.* Ernest Heuer, involving the NE. $\frac{1}{4}$ of Sec. 18, T. 120 N., R. 51 W., Watertown land district, South Dakota.

The land in question is a portion of that formerly comprising the Sisseton and Wahpeton reservation which was restored to the public domain under the President's proclamation of April 11, 1892, and opened to settlement and entry on and after noon of April 15, 1892.

On April 18, 1892, Heuer made homestead entry of the above described tract and in his affidavit alleged settlement on the land one and a half minutes past twelve o'clock, noon, of April 15, 1892.

On the following day Somers applied to enter the same land and in his affidavit alleged settlement two and a half minutes past noon of April 15, 1892.

The local officers thereupon ordered a hearing, citing both parties to appear before their office, and upon the day set in the notice Heuer entered a special appearance for the purpose of moving that the case be dismissed, no formal contest having been filed against his entry nor any allegation of prior settlement to that alleged in his affidavit having been made by Somers.

The motion was overruled and the case proceeded with.

Upon reviewing the record made at said hearing the local officers found that Somers settled as alleged, and further, that it appeared that Heuer was born in Germany and that he did not declare his intention to become a citizen until April 18, 1892, subsequently to the time of his settlement, as alleged, and that he was, therefore, not qualified to acquire any rights by settlement prior to said declaration of intention and therefore recommended that his entry be canceled, with a view to the allowance of the application of Somers.

Upon appeal your office decision reviewed the case and found that the local officers should have granted the motion to dismiss filed by Heuer, but as the record failed to show that he was duly qualified at the time of his alleged settlement, the decision of the local officers was sustained and Heuer's entry was held for cancellation.

From said decision Heuer appealed to this Department resulting in the decision of December 13, 1894, *supra*, in which it was held that Heuer was qualified, for the reasons stated, to make entry at the time of his alleged settlement, and as his motion to dismiss should have been granted the proceedings had under the notice issued by the local officers were dismissed and Heuer's entry was permitted to stand.

In the motion to review now under consideration Somers alleges that in reality he was the prior settler and that he is sustained in that claim by the record as made in the hearing had before the local officers, and that if the contest be now dismissed he will be deprived of his superior claim by a mere technicality.

From a review of the matter I am clearly of the opinion that if Somers was in reality the prior settler, that he should not be deprived of the rights gained by his prior settlement by reason of erroneous action of the local officers in ordering the hearing in the manner as described, but as the record as made at said hearing does not appear to have been considered either by your office or the local office, upon the question of fact as to which of the parties was the prior settler; and further, as the record was made over the protest of Heuer and in the irregular manner that it was, I have to direct that the testimony taken at said hearing be returned to the local officers; that a new day be set, notice of which shall be given both parties, at which they will be permitted to introduce any further testimony desired supplemental to that heretofore offered, and upon the record as thus made, the local officers will consider and determine the question as to which of the parties is shown to have been the prior settler.

Right of appeal should be given from their decision to your office, and the case thereafter disposed of in the usual manner.

Departmental decision of December 13, 1894, referred to is accordingly modified.

HOMESTEAD CONTEST—LEAVE OF ABSENCE—IMPROVEMENTS.

QUEIN v. LEWIS.

A leave of absence, regularly granted by the local office and not disapproved by the General Land Office, serves to protect the settler while in effect, and his absence thereunder does not afford any ground for a presumption against his good faith. An allegation to the effect that the evidence on which a leave of absence was obtained is false and fraudulent, must be affirmatively established to warrant favorable action thereon.

The failure of a homesteader to make a living on his land is not necessarily any evidence of his lack of good faith.

The homestead law does not define the character or value of the improvements required at the hands of the settler.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (E. E. W.)

STATEMENT.—This contest was brought by William B. Quein to cancel Jefferson Lewis' homestead entry of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, T. 7 S., R. 65 W., in Denver, Colorado. The register and receiver dismissed the contest, and the contestant appealed to the General Land Office. The General Land Office reversed the register and receiver, and held the entry for cancellation, and the claimant appealed to the Department.

Lewis first purchased Maddigan's relinquishment of homestead entry of the land in question, and the improvements thereon, paying him \$125 therefor, and made homestead entry of the land himself, March 22, 1890. The improvements at the time consisted of a house twelve by twenty-six feet in size a small out house, and some plowed land, variously estimated at from $3\frac{1}{2}$ to 7 acres. In August Lewis moved his family into the house and lived there with them until in May, 1891, but being a minister of the gospel, and pastor of a church in Denver, he spent Saturday and Sunday of each week in that city. During this actual residence upon the land with his family, he built an addition to the house, doubling its size, otherwise improved it, enclosed it with a wire fence, dug two wells, got out about three hundred fence posts, enough to fence the entire tract, and made some other small improvements, the whole, including those purchased of Maddigan being variously estimated by the witnesses as worth from \$200 to \$456.

During this time he also cut seven thousand and seventy feet of saw logs on the land and had them sawed into lumber. He used about three thousand feet of this lumber in enlarging the house, and sold the remainder, about four thousand feet, for a little less than the expense of cutting, sawing and hauling the whole.

In April, 1891, the conference of his church changed him from Denver to the town of Hygiene, and he applied for leave of absence for one year, which the register and receiver granted. In this application he described the above enumerated improvements, and also represented that they had cost him about \$225; that he had got possession of the land too late in the season to raise a crop, and that it had become necessary for him to be absent from the land to earn a living for himself and family; that his family consisted of his wife and five children; that it was his desire and intention to improve and hold the land, and that he did not wish to jeopardize his rights by his enforced absence therefrom. This application was supported by the affidavits, in due form, of two witnesses. The leave was granted, to be in effect from April 24, 1891, to April 24, 1892, and in May following the claimant went with his family from the land to the town of Hygiene. Two beds, the cook stove, a table, two chairs, some cooking utensils and two barrels of household goods were left in the house, and they were still there at the beginning of this contest.

On the 15th of April, 1892, the claimant applied for leave of absence for another year, reciting substantially all the statements that were contained in his first application, and also representing that he was unable to make a support for his large family on the land, or to obtain employment near it; that his position as pastor of the church at Hygiene was sufficient for the support of his family, but that during the winter they had been attacked by la grippe; that one of his children was still quite sick, and that he believed there would be great risk to the child's life to try to move it back to the land, and that to return to the land at that time would entail upon him the loss of his pastorate at Hygiene, his only means of support for himself and family, or the heavy expense of traveling back and forth between the two places, which would make it impossible for him to save up enough money to take up his residence on the land the next year. This application was also supported by the affidavits of two witnesses. The leave was granted, to be in effect from April 24, 1892, the date of the expiration of the first leave, until April 24, 1893. The granting of both of these leaves of absence was promptly reported to the General Land Office by the register and receiver, and were not disapproved.

On the 6th of September, 1892, which was prior to the expiration of the second leave of absence, Quein filed his affidavit of contest. Omitting the mere formal parts, the affidavit is as follows—

That the said Jefferson Lewis has not in good faith complied with the requirements of the homestead law; that he has not established a *bona fide* residence upon said tract; that he has cultivated no portion of said tract; that the leave of absence obtained by him on the 24th day of April, 1892, was obtained by fraud and through the agency of false affidavits; that said Lewis has cut and removed from said tract about 5000 feet of lumber, and has sold and disposed of the same, and that said Lewis has in no manner improved the tract since the granting of his first leave of absence.

Upon this summons was issued, a day fixed for trial, and all the parties cited to appear. The claimant moved to dismiss, assigning various causes, all substantially that none of the separate allegations, nor all of them together, stated facts sufficient to constitute ground for contest. The motion was overruled, and the claimant then moved to strike out the first, third, fourth and fifth allegations, assigning substantially the same causes set up in the motion to dismiss. The motion to strike was also overruled; and after hearing the evidence and the argument of counsel, the register and receiver found for the claimant and dismissed the contest. The contestant appealed, and upon review of the case, the General Land Office found that the claimant would not have applied for either of the leaves of absence if he had remained in charge of the pastorate at Denver; that his removal from the land under the circumstances shows that he had not maintained a *bona fide* residence, and that his inability to make a living on the land does not excuse him, because that inability was well known to him before he made the entry. Upon these findings the General Land Office reversed the district land office, and held the entry for cancellation.

OPINION.—These findings, and the conclusions based thereon, are erroneous. Whether the claimant would have applied for leave or not, if he had remained in charge of the church in Denver, is immaterial. The fact is, as shown by the testimony, he was in charge of that church when he made the entry, and continued to serve it, and also maintained actual residence upon the land, and did not apply for leave of absence, until he was unexpectedly transferred to the church at Hygiene, a church too remote from the land for weekly trips between. And the Department cannot find from the testimony “that his removal from the land under the circumstances shows that he had not maintained a *bona fide* residence” thereon. On the contrary, the proof shows—indeed, it is not denied—that he established actual residence upon the land with his family in August, 1890, five months after entry, and remained there until granted leave of absence in April, 1891, eight months, and that the leave was renewed and continued in force until the filing of this contest. In determining this case it is not deemed necessary to express an opinion as to whether the grounds stated in the applications clearly entitled the homesteader to the leaves of absence or not. They were deemed sufficient by the register and receiver, and the leaves granted thereon were not disapproved by the General Land Office; they had not been revoked, and the Department could not hold that they did not protect the homesteader so long as they remained in effect. Sec. 3, Chap. 381, act of March 2, 1889, 25 Stat., 854, says—“And such settler so granted leave of absence shall forfeit no rights by reason of such absence.” And then, with evident design to make the meaning of this clause unmistakably clear, a proviso is added as follows—“That the time of such actual absence shall not be deducted from the actual residence required by law.”

It would be at variance with these express provisions of the law, inconsistent with the liberality of its spirit and intent, and unjust to the settler to grant him leave of absence and then take his absence thereunder as the basis of a conclusion of his lack of good faith.

Lewis established his actual residence upon the land within the time prescribed by law, and up to the filing of this contest his family had not resided elsewhere a single day, except under the leaves of absence above cited.

The Department does not overlook the allegations of the contestant that the representations upon which these leaves of absence were granted were false and fraudulent, but the burden was on him to establish his charges by proof, and this he signally failed to do.

Nor does the proof show that the settler claims "that his inability to make a living on the land excuses him, or that such inability was not known to him before he made the entry;" but his plea is that he could hold his pastorate in Denver and at the same time, and with the emoluments thereof, support his family and maintain actual residence upon the land; that he calculated on holding that position, and that his transfer therefrom to a church beyond his reach from the land was wholly unexpected, and the proof shows, or tends to show, that all this was true. Moreover, the law does not require the homesteader to "make a living" on the land, and his failure to do so is not necessarily evidence of his lack of good faith. The only requirements are that he shall in good faith actually reside upon and cultivate the land; and even these requirements have been modified by the leave of absence act, *supra*. In this case a great deal is also said as to the character and value of the improvements on the land. All that is irrelevant except in determining the question of the homesteader's good faith. The law does not prescribe or define the character or the value of a single improvement. The homesteader's domicile may be a bark lodge, a tent, a dugout, a log hut, or a palace, and his farm may be a few acres, or the entire one hundred and sixty. Actual residence upon and cultivation of the land, the making of it his *home* in reality, and not merely in pretence, constitute the small sum named in his bond, and that much he must render in all cases, though the time therefor may be extended under the leave of absence act; but in no case can anything more be exacted from him.

The decision of the General Land Office is reversed.

EXTENSION OF TIME FOR PAYMENT—CASES MADE SPECIAL.

PARKER V. BROWN.

In all applications for extension of time for payment under the joint resolution of September 30, 1890, the cases should be treated as special, to the end that the smallest possible time may elapse from the date of the application to the final judgment thereon.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (G. C. R.)

On October 27, 1892, Parker V. Brown submitted his final proof for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 10, Tp. 14 S., R. 38 W., Wa Keeney, Kansas. He filed his declaratory statement March 23, 1887, alleging settlement two days prior thereto. His final proof shows continuous residence from date of settlement, and improvements ample to show good faith.

On October 29, 1892, he applied for an extension of time for the period of one year, in which to make payment, under the provisions of the joint resolution of Congress, approved September 30, 1890 (26 Stat., 684). His application, with his final proof (found by the local officers to be satisfactory), was transmitted to your office, and on January 3, 1893, you rejected his application, and advised him of the usual right of appeal. Thereupon he applied to your office for a review of said decision.

Your office, on April 19, 1893, denied the motion for review. From that judgment he appealed to this Department. He fails to specify in what particular your office erred, but states, generally, that "at no time prior to the date of proof, or at date of proof, did he . . . have sufficient means or ability to obtain the means (money) to make the payment of entry fees for said pre-emption." The appeal might, therefore, be dismissed under Practice Rule 90. An examination of the facts set forth in the petition, however, shows that the decision appealed from is right, and the same is therefore affirmed.

It will be noticed that claimant applied for an extension of time for one year; his application could not be favorably considered because of the absence of facts, the character and extent of which must be fully shown to authorize favorable action under the statutes and regulations. By his appeal, motions for review, etc., he has succeeded in postponing the payment for the land for a period of two years and five months, when he only applied for one year. In other words, he has accomplished more by his appeals from the rejection of his application than he asked for in the application itself, or that the law provides for. This practice should not longer be tolerated.

I have, therefore, to direct that in all applications hereafter made, or that may be pending, for extension of time in which to make payment, the cases be made special, to the end that the smallest possible time may elapse from the date of the application to that of a final judgment thereon.

Claimant will be called upon to make payment for the land within thirty days from date of notice, and upon default his entry will be canceled.

MCDONALD ET AL. v. HARTMAN ET AL.

Motion for review of departmental decision of December 21, 1894, 19 L. D., 547, dismissed by Secretary Smith, April 12, 1895.

DESERT LAND CONTEST—SUSPENDED ENTRY.

FARNELL ET AL. v. BROWN.

A suspended entry does not run during the period of suspension, but it does run from its date to suspension, and then again, as if without interruption, from the date of the order revoking the suspension to the expiration of the term.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (E. E. W.)

STATEMENT.—Henry A. Brown, the contestee, made desert land entry of Sec. 32, T. 27 S., R. 25 E., in California, April 2, 1877. His entry, with others, was suspended September 28, 1877, and remained suspended until February 10, 1891, when the order of suspension was revoked, both orders being issued by the General Land Office. On the 15th of August, 1893, the contestants offered to file their joint affidavit of contest, alleging that "the claimant has not reclaimed said tract up to date, as required by law; that all laws relating to desert land passed to date, are not properly complied with; that said land is grassy land." The register and receiver rejected this affidavit "because the allegations attack only the non-reclamation of the land and are premature, in that three years from date of entry, exclusive of the period of suspension, have not yet elapsed." The contestants appealed, and the General Land Office affirmed the decision of the register and receiver.

OPINION.—It was error to hold that the contest was offered prematurely. The contestee was required to make reclamation within three years from the date of his entry. (19 Stat., 377.) A suspended entry does not run during suspension, but it does run from its date to suspension, and then again, as if without interruption, from the date of revocation of suspension to the expiration of the term. The time that elapses between entry and suspension must be counted and added to the time that begins to run at revocation of suspension. And, in this case, from April 2, 1877, the date of entry, to September 28, 1877, the date of suspension, was five months and twenty-six days, and from February 10, 1891, the date of revocation of the suspension, to August 15, 1893, the date of the offering of the affidavit of contestants, was two years, six months and five days, and these two spaces of time aggregate three years and one day.

The decision of the General Land Office is reversed, and the register and receiver will be instructed to hear the contest.

PRE-EMPTION CONTEST—PREFERRED RIGHT OF CONTESTANT.

DENMAN *v.* DOMENIGONI.

One who appears at the time fixed for the submission of pre-emption final proof and files a definite charge, in due form, against the alleged right of entry on the part of the pre-emptor, pays the costs of the proceedings, and secures a favorable judgment is entitled to the status of a successful contestant under the act of May 14, 1880.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (E. E. W.)

On the 13th of August, 1890, the contestee, Antonio Domenigoni, filed pre-emption declaratory statement on lots 5 and 6, Sec. 6, T. 6 S., R. 1 W., at Los Angeles, California, alleging settlement five days before; and on the 28th of March, 1891, he published notice of his intention to make final proof on the 15th of May following.

On the 29th of April, 1891, the contestant, Samuel Z. Denman, filed an affidavit of contest, alleging that Domenigoni had not settled upon and cultivated the land as required by law. He also applied to make homestead entry of the land himself, and tendered the fees.

No notice was ever issued on this affidavit, or other action taken in reference to it until the 15th of May, when Domenigoni came to make final proof. On that day Denman filed the following protest:

I, Samuel Z. Denman, do hereby protest against the receipt and sufficiency of the final proof of the said Antonio Domenigoni in the above claim, and I do hereby pray that my contest affidavit against said claim, filed in this office April 29, 1891, be made a part of this protest and considered as a protest as well as a contest herein. The reason for this protest and the grounds thereof are stated in said affidavit and made a part hereof, to wit: That Antonio Domenigoni has changed his residence from said land and has not resided thereon for more than six months since said entry, and has never made a *bona fide* settlement or residence thereon.

In addition to thus presenting his original affidavit of contest with and as a part of his protest, he paid all fees required of him, introduced witnesses, cross-examined Domenigoni's witnesses, and the hearing proceeded in all respects as the trial of a contest. The register and receiver rejected Domenigoni's proof as insufficient, and recommended cancellation of his pre-emption filing, and he appealed. The General Land Office affirmed the decision of the register and receiver, and on the 10th of August he appealed to the Department. Then, on the 28th of September, and without notice to Denman he dismissed his appeal, relinquished his pre-emption filing, and entered the land as a homestead.

On October 4 following, Denman was notified by the register and receiver that these steps had been taken, and six days later he renewed his application to make homestead entry of the land himself. His application was rejected by the register and receiver, their endorsement stating that it was because the land had already been entered by

Domenigoni, and he appealed to the General Land Office. The General Land Office held that Domenigoni's relinquishment of his preemption was the result of Denman's contest, and that, therefore, his homestead entry should be cancelled, and Denman allowed to enter. Then Domenigoni appealed to the Department.

Domenigoni contends that Denman's proceeding was merely a protest, and not a contest, and that, therefore, he is not entitled to the preferred right to enter given under the act of Congress of May 14, 1880. The Department cannot concur in this view of the case. The affidavit of contest was in due form and properly verified. A contest cannot be heard without notice to the contestee, but in this case the contestee had already given notice himself that on a certain day he would offer final proof. The reason for that notice was to give opportunity to all persons to contest, and it obviated the necessity of serving notice on the contestee that the contestant would appear at the designated time and place for that purpose. The only object of notice is to apprise the contestee of the nature of the attack, and of the time and place when and where, and by whom, it will be made. In this case the contestee had given notice of the time and place himself, and he is presumed by law to have come prepared to meet any attack that might be made on his entry by any person whomsoever. He is further estopped from the plea of want of notice by the specific agreement between him and the contestant that the contest should be tried as a protest as well as a contest. It is the opinion of the Department that the object of this—and the only object—was to waive the requirement of notice to the contestee, and that the contestant did not mean to waive his preferred right to make entry, and *did not* thereby waive or forfeit that right. It is also manifest to the Department that Domenigoni's relinquishment was the result of Denman's contest, because the decisions in two trials of that contest—that by the register and receiver, and that by the General Land Office—had been adverse to him, and the status of his case as then pending before the Department might well have been considered hopeless for the contestee. It has been the uniform rule of the Department that after the institution of a contest the preferred right of the contestant cannot be defeated by the relinquishment of the contestee's claim. 10 L. D., 105, 302; 16 L. D., 329. It is clear that the contestant meant for his proceeding to be a contest, and that it was, in fact, a contest, and that the agreement entered into at the hearing was not to reduce the contest to a protest and thereby waive the contestant's preferred right to make entry, but was merely a waiver on the part of Domenigoni of the requirement of notice, his motive therefor being, presumably, to avoid time, inconvenience and expense; that the relinquishment by Domenigoni of his preemption was the result of this contest; that the cancellation of his entry was proper and right, and that Denman should be allowed to enter.

The decision of the General Land Office is affirmed.

FOREST RESERVATION—EXECUTIVE ORDER—SCHOOL INDEMNITY.

STATE OF CALIFORNIA.

The Secretary of the Interior may properly direct the withdrawal of land from disposal, in order to preserve sequoias or other large trees growing thereon, and where the land so withdrawn is unsurveyed, and includes a school section, indemnity may be allowed the State therefor.

Secretary Smith to the Commissioner of the General Land Office, April 13, 1895. (W. M. B.)

The State of California has appealed from your office decision of August 17, 1893, rejecting certain lists of indemnity school selections as follows: No. 1996 for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of Sec. 26, T. 12 N., R. 13 S., M. D. M.; No. 2018 for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, or Lot 5, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, of Sec. 1, T. 11 N., R. 196 E., M. D. M.; No. 2245, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 25, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 28, T. 13 N., R. 13 E., M. D. M. (embracing in the aggregate 639.28 acres), in lieu of Sec. 16, T. 14 N., R. 13 E., M. D. M., Sacramento, California, land district.

The questions involved may be stated as follows—

On November 1, 1892, your office notified the local land office that this Department, on October 25, 1892, directed that said section 16 be "reserved from public entry or selection on account of sequoia and other large trees growing thereon."

In your said office decision now under consideration it is held—

The provision in the act of Congress approved February 28, 1891, amendatory of sections 2275 and 2276 of the Revised Statutes, which says . . . and other lands of equal acreage are also hereby appropriated and granted and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States, . . . is held by this office to apply to reservations created by an act of Congress, or by proclamation of the President of the United States, issued under authority of an act of Congress, or under the authority vested in him as the chief executive officer of the Government, and not to a mere temporary withdrawal of lands pending an investigation as to the character of the trees growing thereon.

Said decision takes the further ground, as stated, to wit:

As to the information upon which the Hon. Secretary acted in directing the reservation of this township, or his purpose in regard to it in the future, I am not advised. It is probable, however, that an investigation will be ordered, and if it is found that said township, or the portions thereof that had not prior to the date of the order reserving them, been disposed of, contains sequoias, or other large trees, the preservation of which is desirable, he may recommend to Congress, or the President, that authority be given for the permanent reservation of the same.

But on the other hand, should an investigation be ordered and the trees found to be of the character indicated, or of insufficient number to warrant the attempt to preserve them, then the land will doubtless be restored to the public domain.

The record shows that the order reserving T. 14 N., R. 13 E., M. D. M. (within which is embraced said section 16), is still in force, and that the present status of said section 16 is, that it is unsurveyed and embraced in a valid subsisting reservation.

It is held by the supreme court that the act or order of the head of a Department, within the scope of his power or authority, is in contemplation of law, the act or order of the President. Vide 101 U. S., p. 755.

There can be no question that under the general land laws this Department had a right to order that reservation be made of said section 16, for the object and purpose above stated, and that such reservation as was made and now being considered in the case at bar, would, under the rule laid down in the case of the United States v. Grand Rapids and Indiana Railroad Company (17 L. D., 420) entitle the State of California to make selection of the lands designated in its rejected application.

It is not necessary that the reservation of said section 16 be of a permanent character to justify indemnity selection made by the State, for under the ruling in the case of *ex parte* Battlement Mesa Forest Reserve (16 L. D., 190), lands embraced within a temporary order of withdrawal of lands from settlement or selection by the Department, with the view of creating a forest reservation, excludes from selection by the State, the lands so reserved, pending final action by this Department, gives to, or confers upon, the State (while the basis of lands in place is suspended from selection pending an examination of the lands temporarily reserved) the unquestionable right to make selection of other lands, for school purposes, equal in acreage to the tract so reserved.

The reservation, was made, as stated, by departmental letter of October 25, 1892, to your office, which is in the following words—

SIR: Upon the report, a copy of which is herewith enclosed, I have to direct that you will reserve from public entry township 14 North, range 13 East, California.

Very respectfully,

JOHN W. NOBLE,
Secretary

There is nothing in the above quoted letter, however, which clearly shows that the order of withdrawal, of the lands embraced in said section 16, is of a *temporary* nature.

For the reasons herein set forth, and in view of the facts above stated, your office decision, appealed from, rejecting the State's indemnity application for lands therein described, made November 22, 1892, is hereby reversed.

PRACTICE—APPEAL—SPECIFICATION OF ERRORS.

MCNEICE *v.* GALE.

An appeal will not be entertained in the absence of a specification of errors that clearly designates the errors of which the appellant complains.

Secretary Smith to the Commissioner of the General Land Office, April 13, 1895. (J. I. P.)

By your office letter "H" of February 15, 1894, you transmitted here the appeal of Mattie Gale, defendant in the above entitled cause, from your office decision of October 31, 1892, holding for cancellation timber culture entry No. 6583 for the SE. $\frac{1}{4}$ of Sec. 33, T. 3 N., R. 31 W., McCook, Nebraska, land district.

Notice of appeal was duly served on the opposite party, and the specifications of error are as follows—

1. Said decision is clearly against the weight of the evidence introduced on the trial of said case before the register and receiver at the McCook, Nebraska, land office.

2. Said decision is contrary to the law, and in conflict with the rulings of the Department in such cases.

3. Said decision seems to have been based and made upon grounds and for reasons not mentioned in the evidence of contest filed herewith.

The plaintiff files a motion to dismiss said appeal, for the reason that the same does not contain specification of the errors complained of, as required by the rules of practice, and second, because said attempted appeal is not sufficient under the rules of practice, citing the case of *Underhill v. Berryman* (15 L. D., 566), and cases therein referred to.

In the case of *Underhill v. Berryman*, *supra*, the assignment of errors was as follows—

1. The Honorable Commissioner's decision is contrary to the evidence submitted in this case.

2. The Honorable Commissioner's decision is contrary to law.

3. The Honorable Commissioner's decision is contrary to the law applicable to cases of this class.

The Department held that such an assignment of errors did not come within the requirements of Rule 88 of Practice, which provides that "within the time allowed for giving notice of appeal the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains," and so holding, dismissed the appeal.

It will be observed that the assignment of errors in the case of *Underhill v. Berryman*, *supra*, is identical in character with that of the defendant in the case at bar. Manifestly, the defendant's specification of errors here does not clearly and concisely designate the errors of which he complains.

The appeal is therefore dismissed, with directions to close the case.

BASIS OF PATENT—OFFICIAL RECORD.

JOHN R. MAXWELL.

An application for a patent based on an alleged purchase of a tract will not be granted, where, owing to the war of 1861, there is no official record of the alleged transaction.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 13, 1895. (P. J. C.)

It appears by the record in this case that John R. Maxwell, on July 11, 1893, presented to your office a petition asking that patent may issue to him for the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 6 S., R. 3 W., Little Rock, Arkansas, land district, upon an alleged entry made April 29, 1861. It seems that this matter has been the subject of prior communication between your office and the representatives of Maxwell, and his request had been informally denied April 25, 1890, by your predecessor.

The petitioner sets forth what purports to be a copy of the receiver's receipt, bearing date April 29, 1861. This appears to be in form, is signed by the receiver, and numbered 14,097.

Under date of July 27, 1893, your office called upon the local officers at Little Rock for a report as shown by their records of this alleged entry, stating that your "office has no record of an entry allowed" of that date. They report under date of December 12, 1893, "that no application has ever been made to enter" this land, "as shown by our records."

From the record I glean the fact that the last entry reported officially to your office from the Little Rock office prior to the war was numbered 14,025, and dated December 31, 1860, and the next cash entry in the series was numbered 14,026, and was made in February, 1866. Your office, by letter of November 1, 1893, denied said petition, whereupon Maxwell prosecutes this appeal, alleging that it was error to hold—

"That said entry could not have been made under U. S. authority for the reason that the last entry reported to this office prior to the civil war was numbered 14,025, and of date December 31, 1860, and the next entry was 14,066, and was not made until 1866."

The facts are that the receipt was given by a regularly appointed United States Receiver, as attested by the records of your office.

In this specification of error counsel has followed the error in your office decision in giving the last number as 14,066, when the record shows unmistakably that it is 14,026.

Mr. Secretary Schurz passed upon this same question in 1880 (Isaac C. Hicks, Copp's P. L. L., Vol. 1, p. 315), and the subject was then exhaustively gone into. This case was a stronger one in favor of the alleged entryman than the one at bar, for the reason that Hicks' original application was found, whereas here there is nothing presented but

an alleged copy of the receiver's receipt, and it is shown there is nothing in the records of the local office to indicate any such entry.

After reciting the facts in the Hicks case, my predecessor held that "the papers themselves" "fail to make a *prima facie* case," then added—

But there is another reason for declining to open these claims for further consideration. The events and settlements of the questions growing out of the war were political, and made, in a manner, according to the exigencies of the case, and with a view to a prompt and speedy return to regular methods when again extending the operation of the general laws over the lately insurgent districts.

To this end, upon the re-opening of the district offices in Arkansas, your office, by letter of the 27th of October, 1865, instructed the register and receiver at Little Rock, with respect to these irregular unreported entries, and declined in advance to give them any recognition whatever. In a matter of such importance as the restoration of intercourse and the re-establishment of the land system, it must be presumed that your predecessor acted with the full concurrence and advice of the Secretary of the Interior, and the conclusions then reached and acted upon, have the force of *stare decisis* in the Department.

In those instructions I find the following: "Herewith is a statement showing the date of the last returns received from the Arkansas offices, and the last recorded and recognized numbers of cash certificates and R. & R. numbers of warrant locations.

"In re-organizing and commencing the business of your office, you will begin your cash entries with No. 14,026, and in the same manner continue the series of warrant locations under different acts from the numbers given herewith, paying no heed to the higher numbers that may have been issued without authority by persons who renounced allegiance to the government of the United States. The attempted disposals of the United States public lands by other than United States authorities, are wholly illegal and void, and such sales cannot be recognized by the Department."

A list of dates and numbers follows the foregoing.

Further on, the officers were required to collect and report all practicable information respecting these unauthorized sales, for future reference.

And on the first of May, 1866, the register and receiver were advised to give thirty days' notice to purchasers at such sales, that they would be allowed a preference right of purchase of the lands so entered, in order that actual occupants might not be deprived of their possessions without an opportunity to perfect their titles under United States laws.

It is true that the claim now set up presents an apparent purchase from the United States officers before the formal act of secession. But I do not regard this as materially affecting the question. The rebellion had already commenced. The time imminent. Six days only elapsed, and during that six days the duty to report the month's returns had matured. It was not done. All appears to have been carried together into the movement against the legal government, and the inchoate individual right, if any existed, became merged into the general result, and is only now sought to be revived after a lapse of nearly seventeen years, and when the proper authorities, having the whole subject under consideration, have already settled it as an incident of the general policy. All that is now known might have then been presented. It must be held to have been included in the adjudication (*Vance v. Burbank*, 101 U. S., 514).

If any relief be needed in this and similar cases, Congress is the proper source from which to obtain it; the laws, regulations and precedents, not warranting action by this Department looking to a recognition of the claim.

The judgment of your office is therefore affirmed.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE—RESERVATION.

NORTHERN PACIFIC R. R. Co.

The withdrawal on general route for the benefit of the Northern Pacific grant is "from sale, entry, and pre-emption" only, and does not debar, within its limits, the executive from the exercise of its ordinary authority in the establishment of an Indian reservation; and lands within said limits, so reserved at date of definite location are excepted from the operation of the grant, and revert to the public domain on cession thereof by the Indians.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 13, 1895. (F. W. C.)

I am in receipt of your office letter of March 20, 1895, submitting for the consideration of this Department a communication from Messrs. Britton and Gray of this city, attorneys for the Northern Pacific Railroad company, wherein it is claimed that the ceded lands formerly comprising a part of the Coeur d'Alene Indian reservation in Idaho, so far as the same upon survey are identified as parts of odd numbered sections, are a part of the grant to the said company and requesting that the local officers be advised not to receive entries for such lands.

From the statement of the case contained in your office letter of March 20, 1895, it appears that on June 14, 1867, the President directed that certain lands in Idaho Territory be set apart for reservation for Indians. The lines indicated in said order were laid down upon the map in your office but no survey of said reservation appears to have been made.

Subsequently a larger reservation appears to have been agreed upon and a survey made thereof, and by executive order of November 8, 1873, a reservation agreeing with this survey was declared.

The lands covered by the order of November 8, 1873, fall within the limits of the withdrawal adjusted to the map of general route of the Northern Pacific Railroad, which was filed on February 21, 1872.

The sixth section of the act of July 2, 1864 (13 Stat., 365) making the grant for said company provided:

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company, as provided by this act.

In the case of the Northern Pacific Railroad Company *v.* Martin (6 L. D., 657) it was held that the legislative withdrawal following the designation of the general route of the Northern Pacific Railroad was only "from sale, entry and pre-emption" and did not debar, within its limits, the executive from the exercise of its ordinary authority in the matter of the establishment of military reservations.

The map showing the definite location of the line of said road opposite the lands covered by said reservation was filed in your office on August 30, 1881. The reservation made by the order of November 8, 1873, was then in existence and remained in force until, by act of Congress approved March 2, 1889, Sec. 4 (25 Stat., 102), the Secretary of the Interior was authorized to negotiate with the Coeur d'Alene Indians for a cession of a portion of their reservation, and the negotiation having been completed and an agreement having been reached on the part of the United States Commissioners and the Indians, Congress, by act approved March 3, 1891, Sec. 20 (26 Stat., 1029) ratified and confirmed said agreement whereby a portion of the tract reserved in 1873 was ceded to the United States.

In answer to a telegram from Hon. J. L. Wilson, concerning the effect of the act of 1891 as regards the ceded portion of said reservation, the Secretary of the Interior, Mr. Noble, advised him on March 26, 1891, as follows:

Upon due consideration of the matter, I will say that in my judgment, the Coeur d'Alene reservation, as described in the act, was opened by force of the statute and needs no proclamation or further action to accomplish that end. . . . This opinion is given without any argument made to the Department and is to be received as an expression of views that may be changed if there is any dispute arising concerning its validity in a contest case. It is deemed, however, by the law officers of the Department reasonably clear that the statute has the effect of opening the reservation as a public domain.

Following this opinion it appears that the local officers at the Coeur d'Alene land district were, on June 8, 1894, advised by your office that the ceded lands of said reservation were subject to disposal under the homestead laws, since which time it appears that the lands have been disposed of within the ceded country as part of the public domain, without regard to any right in the company to the portions of the odd-numbered sections.

The 22d section of the act of March 3, 1891, *supra*, provides that all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, etc.

It is upon the exception herein stated that the company claims that the act gives recognition to its grant and that the same is not therefore defeated by the existence of said reservation at the date of the definite location of its road.

It might be here stated that by article VI. of the agreement found on page 1028 of the statute

it is agreed that the Coeur d'Alene reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may have removed to said reservation under this agreement, and their posterity; and no part of said reservation shall ever be sold, occupied, opened to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

It must be admitted that the effect of said agreement is to appropriate to the use of the Indians the portion of the reservation created by the order of November 8, 1873, and not embraced in the ceded portion.

This can only be maintained upon the theory that the lands were excepted from the company's grant, or that it was, to that extent, a *pro tanto* forfeiture. With the knowledge of the previous holding of this Department to the effect that the reservation, on the filing of the map of general route, did not debar the executive from the exercise of its ordinary authority in the matter of establishing military reservations within the limits of such withdrawal, it must be presumed that Congress but gave recognition to the same and dealt with the lands within the present reservation as a part of the public domain. If the lands within the present reservation were excepted from the company's grant, so were also those in the ceded portion of the old reservation, and to recognize the present claim made by the company would be to hold that the effect of the language used in the 22d section of the act of March 3, 1891, *supra*, was to that extent a new grant, for which I can find no authority, for to make a grant there must be words of grant, which are lacking in said section.

After a careful consideration of the matter I see no reason to disturb the previous directions given by your office in instructing the local officers to dispose of all the lands within the ceded portion of said Coeur d'Alene reservation under the provisions of the homestead law.

The company's request is, therefore, denied.

SOLDIER'S DECLARATORY STATEMENT—CONTESTANT—OKLAHOMA LANDS.

MULLEN *v.* PORTER.

The standing of one who files a soldier's declaratory statement for a tract covered by the prior settlement right of another that is subsequently asserted in the form of an entry, will not defeat the preferred right of a contestant who successfully attacks said entry.

The right of a contestant to proceed against an entry is not defeated by a relinquishment filed prior to the hearing.

A soldier's declaratory statement, filed for a tract of land in Oklahoma by an agent who entered said territory prior to the time fixed therefor is illegal, and confers no right on the claimant.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (G. C. R.)

Daniel Porter has appealed from your office decision of October 21, 1893, holding for cancellation his homestead entry, made August 23, 1889, for the SE. $\frac{1}{4}$ of Sec. 10, T. 16 N., R. 7 W., Kingfisher, Oklahoma.

The facts disclosed by the record are as follows:

In the afternoon of April 22, 1889, Robert H. Cooper made settlement upon the land, setting up a few stakes, on which he placed his name; he also plowed a small strip of land, and began to dig a well.

On the next day (April 23d) one H. H. Allen filed in the local office soldier's declaratory statement No. 2, for the land, as agent for Daniel Porter (defendant herein). On the same day, but subsequent to the filing of Porter's soldier's declaratory statement, the said Cooper made homestead entry for the land.

On May 2, 1889, Enos Mullen (plaintiff herein) filed his uncorroborated affidavit of contest against Cooper's entry, alleging that Cooper had sold and relinquished all his right, title and interest in and to said land; that the land was not settled upon and cultivated as the law requires, and that the entry was made fraudulently and for speculative purposes.

On July 5, 1889, an affidavit corroborating said contest affidavit was filed, and on August 13, 1889, notices were issued for a hearing; but prior to the day so fixed, and on August 23, 1889, one E. C. Cole presented Cooper's relinquishment for the land, and the latter's entry therefor was canceled, and townsite application, made by E. C. Cole and others, was filed. Daniel Porter on the same day (August 23d) transmuted his soldier's declaratory statement No. 2 to homestead entry No. 3846.

On September 27, 1889, Enos Mullen filed his amended and supplemental affidavit of contest making Daniel Porter a defendant.

This amended complaint alleged, among other things :

1. That the cancellation of Cooper's entry was caused by his (Mullen's) contest.

2. That Daniel Porter's soldier declaratory statement was illegal and fraudulent from its inception in that it was filed by one H. H. Allen, as agent for Porter; that Allen was upon and in the vicinity of the land prior to twelve o'clock noon of April 22, 1889, contrary to law and the proclamation of the President.

Hearing was ordered, and upon the day fixed (January 27, 1890,) Porter's attorney moved the dismissal of the contest, on the grounds that the same did not state a sufficient cause of action.

The register and receiver sustained the motion, and Mullen appealed.

Your office by decision, dated September 16, 1890, reversed the action of the local officers, and ordered a hearing, which was duly had.

Upon the hearing the register and receiver, on July 9, 1891, dismissed both Mullen's contest against Cooper's entry and his supplemental affidavit of contest against that of Porter; also rejected the townsite application of Cole and others, and recommended that Porter's entry remain intact.

No further action appears to have been taken by the townsite applicants, but Mullen appealed, and your office by decision, dated May 29, 1893, affirmed the action of the local officers.

On June 2, 1893, Mullen filed a motion for review of your office decision, awarding the land to Porter, and your office, by decision dated October 21, 1893, sustained the motion, and held Porter's entry for cancellation. An appeal from that judgment brings the case here.

The record presents two questions:

1. Did Mullen acquire a preference right by his contest against Cooper's entry.

2. Did Allen, as an agent of Porter, enter the Territory prior to the time fixed in the President's proclamation, and, if so, did such unauthorized act affect the rights of Porter, who violated no law.

It is clearly shown that Cooper settled on the land on the afternoon of April 22, 1889. For all that appears in the record he was qualified to make entry, and did enter the land on the next day, but before his entry was made of record H. H. Allen, as agent for Daniel Porter, filed a homestead declaratory statement for the latter. This homestead declaratory statement, if in all respects legal, gave the applicant six months from the date of location in which to make his entry and settlement. The effect of such a location is to cut off all intervening claims for the time mentioned in the statute (Sec. 2304 Revised Statutes).

If the lands applied for under a soldier's declaratory statement have already been settled upon by one qualified to take under the public land laws, and such settler puts his claim of record within the required time, the settler has the superior right to the land, although his entry of record may be subsequent to the filing of the soldier's declaratory statement. The entry of such settler may thereafter be attacked by any one alleging non-compliance with the law, and the soldier's declaratory statement gives to the soldier no better or further rights over the land than is possessed by others.

In the case at bar, Mullen filed his affidavit of contest against Cooper's entry, as he had a right to do. He alleged that Cooper had violated the law, by selling the land entered to the alleged townsite company. Prior to the hearing, but after notice was issued, Cooper's relinquishment was filed by a member of the townsite company. It is evident that Mullen's right to proceed against the entry was not defeated by the filing of this relinquishment. *Webb v. Loughrey et al.*, on review, 10 L. D., 302.

The local officers having allowed Porter to make entry of the land, the latter was properly made party defendant.

It was shown at the hearing that Cooper sold the land for \$900, and in consideration of that sum, he relinquished the entry. Mullen, having proved his allegation, was thus entitled to a preference right of entry.

It will be noticed, however, that Mullen made certain allegations against Porter's entry (above set forth). From what is above said, it is immaterial whether Porter complied with the law or not, or whether or not his agent (Allen) was within the Territory during the prohibited period, and used undue and illegal means to secure the tract of land for his client.

I have, however, carefully examined the evidence as to this allegation, and concur in the conclusions reached by your office that Allen

disqualified himself by coming into the Territory during the prohibited period. Since Allen filed the soldier's declaratory statement as agent for Porter, such filing is illegal and void. *Guthrie Townsite v. Payne et al*, 12 L. D., 653.

The decision appealed from is affirmed.

TIMBER CULTURE ENTRY—ACREAGE SUBJECT TO ENTRY.

ELBERT S. LAMON.

A timber culture entry is limited to one-fourth of the land embraced in the section, except where such entry is of a technical quarter section.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (W. F. M.)

On June 28, 1880, Elbert S. Lamon made timber culture entry of lots 1 and 2 of Section 6, Township 11 N., Range 9 W., within the land district of Grand Island, now Lincoln, Nebraska, and final certificate was issued on January 19, 1893.

By your office letter "G" of October 6, 1893, the entry was suspended for repugnance to section 1 of the timber culture act (20 Stat., 113), limiting entries to "not more than one quarter of any such section," and requiring the entryman, Lamon, to relinquish one of the subdivisions, or lots, embraced in his entry.

It appears from your said office letter that the entry covers the whole of section 6, which contains only 27.20 acres, subdivided into lots 1 and 2.

In *John W. Snode*, 13 L. D., 53, it is held "that it was the intention of Congress to allow one quarter (approximately) of the number of acres in any one section to be appropriated under the act," and in *Weaver v. Price*, 16 L. D., 522, the rule was so far extended as to hold that a timber culture entry is limited in acreage to one fourth of the land embraced in the section, except where such entry is of a technical quarter section.

The decision appealed from, therefore, has followed the rule heretofore laid down by the Department, and the same is affirmed.

SETTLEMENT BEFORE SURVEY—NOTICE.

LUKE v. BIRDWELL.

The notice of a settlement claim given by improvements on unsurveyed land extends only to the technical quarter section on which said improvements may be found. A notice to a settler before survey of a contingent claim on the part of one who has not reduced the land to possession, nor placed any improvements thereon, will not serve to defeat the right of the settler.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (F. W. C.)

I have considered the appeal by Matt Birdwell from your office decision of June 7, 1893, awarding to Frank Luke the prior right of entry for lots 4, 5, 6 and 7, Sec. 2, T. 39 N., R. 5 E., W. M., Seattle land district, Washington.

The plat of this township was filed in the local office on August 19, 1891, and on the same day Birdwell filed pre-emption declaratory statement for lots 4, 5, 6 and 7, Sec. 2, and lots 1 and 8, Sec. 3, of said township, and same day Luke filed pre-emption declaratory statement for lots 4, 5, 6 and 7, of said section 2.

In accordance with public notice Birdwell tendered proof under his filing on November 24, 1891, against the acceptance of which Luke protested, claiming an adverse prior right to said lots 4, 5, 6 and 7, of Sec. 2, and upon said contest hearing was regularly held.

Both parties settled long prior to survey and the question presented is as to the rights under their respective settlements as shown.

Upon the testimony adduced at the hearing the local officers awarded Birdwell the prior right of entry as to all the land covered by his filing, except the E. $\frac{1}{2}$ of lot 5, of Sec. 2, to which it was held Luke had a prior equitable right which should be recognized.

From said decision both parties appealed. Your office decision awarded to Birdwell lots 1 and 8 of Sec. 3, but held, as before stated, that Luke had the prior right of entry as to lots 4, 5, 6 and 7, Sec. 2.

It appears that the land in question is bounded by the settlement claims of Carthage Kendall, Wm. Follett, Jerome B. Hardiman and the river.

Kendall, Follett and Hardiman were early settlers and it was supposed that in the adjustment of their claims upon the survey of the lands there would be a vacant tract of forty acres, and perhaps more, not included in the several claims.

To this center tract one Kendall, a nephew of Carthage Kendall, made claim in the spring of 1889. The only improvements that appear to have been made when he held the tract consisted of a small clearing. In June of 1889 Birdwell, who was in search of land, purchased Kendall's relinquishment for \$25, and soon after erected a small cabin upon lot 8 of Sec. 3. In July he had some clearing done upon said lot 8, and

in September following built a house upon said lot in which he and his family have since resided; all of his improvements being upon said lot 8.

The claims of none of these parties who settled prior to survey appear to have been in any wise marked by the running of lines or blazing of trees, but it was well understood that in the adjustment upon survey Kendall and Follett, being older settlers, would have the prior right to adjust their claims, and it was believed that the claims of Kendall and Follett would corner.

While it is clearly shown that Birdwell intended to claim all of the center tract that should not be included in the claims of Hardiman, Follett and Kendall upon the adjustment of their claims after survey, yet it also appears that his actual claim was limited to the sub-division upon which his improvements existed, which upon survey was shown to be lot 8, of Sec. 3. As to any other land that might fall to his lot upon survey his claim was purely contingent.

In September of 1889 Luke being in search of public land, settled upon what appears to have been the south-east corner of the sub-division claimed by Birdwell, where he began to make a clearing with a view of erecting a house. While so engaged he was warned by Birdwell of his prior claim, and, after a consultation with the older settlers, he moved in a northeasterly direction building his house upon what, after survey, proved to be the west half of lot 5, Sec. 2. His house was completed in the fall of 1889, into which he moved his family the following winter and they have since continued to reside therein.

Both Birdwell and Luke have improvements of the value of about \$1,000; Birdwell's being located on lot 8, Sec. 3, and Luke's on lot 5, of Sec. 2.

It is well settled by the repeated rulings of this Department that the notice given by improvements made upon public land prior to survey extends only to the technical quarter section upon which they are found, and as the land claimed by Birdwell is in two different sections it seems that the improvements made by him were merely notice of his claim as to the portion claimed in Sec. 3.

While it is true that Birdwell notified Luke that he should, upon survey, claim all lands not embraced in the surrounding claim of prior settlers, yet, as before stated, at the time of Luke's settlement it seems to me to be clearly shown by the testimony that lot 5 was supposed to be within the settlement claims of Follett and Kendall, and had their claims cornered, as it was supposed they would prior to survey, Birdwell would have had no right as to said lot 5, and could not, therefore, have included lots 6 and 7 which are not contiguous with his claim without lot 5.

It appears that Luke's settlement was made with the knowledge of, and at the instance of, Follett who advised him that there would be vacant land between Birdwell and the river upon the adjustment of all their claims upon survey.

As before stated, Birdwell's claim as to any land except lot 8, was merely contingent, that is, he would claim it should the others not embrace it in the adjustment of their claims upon survey.

He made no improvements upon the lots in Sec. 2 or did any act reducing them to possession, and I am therefore of the opinion that he had no such claim to the lots in Sec. 2, as would prevent the acquirement of a settlement right in Luke.

Luke settled with a knowledge that Follett and Kendall might embrace the land claimed by him in the adjustment of their claims, but as they excluded it upon survey his right under the settlement made as before stated is clearly superior to the contingent right of Birdwell.

I therefore affirm your office decision and direct that Luke be called upon and allowed a reasonable time within which to complete his claim to lots 4, 5, 6 and 7, Sec. 2, and upon completion of the same, that Birdwell's proof as to said lots be rejected and his filing to that extent canceled.

APPLICATION FOR LEAVE OF ABSENCE.

WALTER E. QUAIFE.

An application for leave of absence will not be granted if it does not affirmatively appear that the applicant has shown good faith in residence upon and cultivation of the land up to the date of his application.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (E. E. W.)

STATEMENT.—The applicant, Walter E. Quaife, made homestead entry of the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 10, and W. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 15, T. 19 N., R. 12 W., at Kingfisher, Oklahoma, January 4, 1893. On August 3, 1893, he made application for leave of absence for one year, alleging that he established his residence on the land February 15, 1893, built a sod house twelve by fourteen in size, and resided there continuously until March 15, 1893; that, having no team of his own with him, he hired a neighbor to break and plant seven acres of the land; that owing to the lateness of the season when the breaking was done his crops, as he is informed and believes, had been an entire failure, and that, therefore, he could not earn a support on the land for the ensuing year; that he had arranged with neighbors and friends to put in a fall crop of wheat. He then appeared to be at Robinson, in Brown County, Kansas, and gave that place as his post office. The register and receiver overruled the application, holding that it did not allege facts sufficient to entitle him to the leave prayed for, and he appealed. The General Land Office affirmed the action of the register and receiver, and he appealed to the Department.

OPINION.—Whenever any homestead settler is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself and those dependent upon him, on his claim, the register and receiver may grant him a leave of absence not exceeding one year, act of March 2, 1889, 25 stat., 854, and the applicant in this case alleged that his crops for the year 1893, as he was informed and believed, were an entire failure, and that, therefore, he could not earn a support on the land. Unquestionably this allegation would entitle him to the leave if he had as clearly shown good faith in residence upon and cultivation of the land up to the date of his application. But this he has not done. According to his own statement, in the seven months that had elapsed between the date of entry and the filing of the application for leave, he had resided on the land only one month, was not then on the land, did not cultivate it himself, and testified to the failure of the crops only upon information. And the fact that he had no team “with him” cannot be accepted as excuse, for the form of that statement implies that he had a team somewhere else.

Before leave of absence can be granted to a settler he must not only show that by reason of total or partial destruction or failure of his crops, sickness, or other unavoidable casualty, he is unable to procure a support for himself or those dependent upon him, on his claim, but he must also affirmatively and specifically show that he has in good faith established and maintained actual residence upon the land and cultivated it from the date of entry to the filing of the application for leave, as the law requires. This the applicant Quaife has not done.

The decision of the General Land Office is affirmed.

MILITARY BOUNTY LAND WARRANT.

MCNAMARA v. LOMBARDY.

Where a military bounty land warrant is used in payment for land, and said warrant is subsequently canceled on the ground of a fraudulent assignment thereof, a *bona fide* assignee of the entryman may be permitted to substitute cash in lieu of the canceled warrant.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (A. E.)

The record in this case shows that on August 26, 1857, William Lombardy made proof under the pre-emption law for the SW. $\frac{1}{4}$, Sec. 30, Tp. 14 N., R. 12 E., Omaha series (now Neligh), Nebraska, paying for the land with military bounty land warrant No. 23,303, act of 1855, and receiving certificate. Subsequently the warrant upon which this certificate was issued was canceled by the Commissioner of Pensions, because the assignment thereof was a forgery. The certificate for the land, however, remained intact upon the records of the land office.

On April —, 1893, Daniel W. McNamara applied to make homestead entry of the land and to contest the claim of Lombardy. These applications were rejected, and McNamara appealed.

Meantime, one John M. Scibold, assignee of William Lombardy, applied to be substituted for the latter under the circular of your office of July 20, 1875, page 9, section 41.

On June 24, 1893, your office considering both the applications of McNamara and that of Scibold, rejected the former and allowed Scibold sixty days within which to substitute cash in lieu of the canceled warrant, and directed the register and receiver to issue receipt therefor. From this McNamara has appealed to this Department.

Appellant contends that as the warrant which was used to pay for the land in controversy was afterwards canceled, and a new warrant issued, because the assignment was forged, the original warrant was null and void, under section 2441 of the Revised Statutes, 1878:

This section provides:

Whenever it appears that any certificate or warrant, issued in pursuance of any law granting bounty-land, has been lost or destroyed, whether the same has been sold and assigned by the warrantee or not, the Secretary of the Interior is required to cause a new certificate or warrant of like tenor to be issued in lieu thereof; which new certificate or warrant may be assigned, located, and patented in like manner as other certificates or warrants for bounty-land are now authorized by law to be assigned, located, and patented; and in all cases where warrants have been, or may be, re-issued, the original warrant, in whosever hands it may be, shall be deemed and held to be null and void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration.

It is quite clear that the case under consideration does not come within that section, and as Scibold appears to be a bona fide assignee of Lombardy, he is entitled to the provisions of the regulation of your office circular relating to bounty warrants, dated July 20, 1875, page 9, section 41.

Your office decision of June 24, 1893, is therefore affirmed.

HOMESTEAD ENTRY—FINAL PROOF—PROTEST—CONTEST—PRACTICE.

GRAY v. DAWKINS.

The fact that a party styles his adverse proceeding against a homestead entry at the time of final proof thereon, a "protest," will not defeat his right as a contestant where he files at such time a corroborated charge, pays the costs, and claims a preferred right under the act of May 14, 1880; nor can the entryman in such case defeat said proceedings by the withdrawal of his final proof.

Where, on application for continuance, on the ground of absent witnesses, the adverse party admits that said witnesses, if present, would "testify to the statement set out," the applicant is not prejudiced by a denial of his application.

There is no law, or rule of the Department, that warrants the local officers in extending the time for taking final proof beyond ten days from the time set therefor in the advertisement.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (P. J. C.)

The land involved in this appeal is the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and Lots 5, 6 and 7, of Sec. 1, T. 64 N., R. 4 W., Duluth, Minnesota, land district.

The record shows that James C. Dawkins made homestead entry of said tract August 20, 1891. On September 6, 1892, he gave notice of intention to offer final proof October 24 following.

On October 3, James M. Gray filed what he denominated a protest against the entry.

On the day when final proof should have been taken Dawkins appeared and moved to dismiss his proceedings in the matter of the final proof, for the reason that he had been unable to procure the attendance of one of the advertized witnesses, by whom he could prove fourteen months' residence on the land. The name of this witness is given as D. H. Gorden. This motion was granted, and Dawkins re-advertized to submit proof December 20, 1892.

On November 2, Gray again filed what he calls a protest against the acceptance of the proof, alleging that Dawkins never made settlement of the land or established a residence thereon; that he has resided during all the time in the city of Superior, Wisconsin, carrying on business at that point. He asks that he may be allowed to appear and cross-examine the witnesses, and introduce proof to establish the charges, agreeing to pay "all the expenses of the hearing in said case, and he hereby claims the preference right of thirty days to enter said tract of land, under the act of May 14, 1880, pending the cancellation of said homestead entry." This affidavit is corroborated by two witnesses.

It appears from the record that both parties appeared at the local office, and on December 27, the testimony of two witnesses of Dawkins was taken on the final proof, and one of the witnesses, Tucker, was cross-examined by Gray on that day, when the case was adjourned until January 3, 1893.

On December 30, 1892, Dawkins filed an affidavit, in which he says that he had relied upon David and Swamper Carriboo, two witnesses named in his final proof publication, who had not appeared; that he relied upon these two witnesses to be present and testify concerning his settlement and residence on the land; and that they could testify to his residence thereon for upwards of fourteen months preceding that date; that they were absent without his procurement or consent; "and that he cannot safely proceed to trial without them;" expects to be able to procure their attendance as soon as navigation opened, which would be about May 15, 1893; "whereupon he asks that upon taking deponent's testimony, and that of the witnesses Frost and Tucker,

that said case be adjourned to May 16, 1893." This motion was overruled on the day it was presented.

On the day set for the hearing, January 3, Dawkins presented a "motion for continuance, or an alternative order dismissing the proceedings instituted by claimant without prejudice." This motion was supported by an affidavit, in which he sets up at some length the connection that David and Swamper Carriboo had with his settlement, and their knowledge of his residence on the land, and the impracticability of their being able to get to the local office until the opening of navigation; that the witnesses who did testify to his final proof were not able to swear from their own personal knowledge of his residence on the land for the period required by statute.

Upon the filing of this motion and affidavit, Gray filed a written agreement, admitting that the witnesses would, if present, testify to the statement set out in the application for a continuance, as provided by Rule 22, Rules of Practice.

The local officers thereupon overruled the motion, and ordered the hearing to proceed, and that the witnesses Frost and Dawkins should be produced for cross-examination by protestant; I quote from the record as it appears: "whereupon the attorney for claimant stated that for the reason that the witnesses David Carriboo and Swamper Carriboo were absent, and the proof could not be made as expected; that at this time the claimant would withdraw his proof, and also from the case." Gray then proceeded to take the testimony of several witnesses.

The local officers decided in favor of the contestant, recommending that Dawkins' homestead entry be held for cancellation.

Dawkins appealed, and your office, by letter of November 8, 1893, affirmed their decision. Whereupon he prosecutes this appeal, assigning numerous grounds of error, but all based upon the proposition that it was error to allow Gray to proceed after the claimant had asked that his final proof proceedings be abandoned, insisting that Gray was but a protestant and should not have been given the status of a contestant in said proceedings.

There can be no doubt but that Gray was a contestant, notwithstanding he calls his proceeding a protest. His affidavit is corroborated; he offered to, and the record shows that he did actually, pay for the taking of the testimony. He expressly asks for the preference right of entry. All these essential features fix his status as that of a contestant. The charges he preferred are such as might have been made at any time, regardless of any action of the claimant looking to making his final proof. He elected to make his charges when the final proof was submitted. The local office acquired jurisdiction by this proceeding and the claimant was before it for all purposes.

So far as the record shows, the final proof that was submitted was voluntarily done by the claimant. It is true that the testimony of his witnesses is not sufficient to warrant the acceptance of the proof, in

that they cannot testify as to claimant's residence prior to May, 1892. But this fact must have been known to the claimant when he called the witnesses; in fact, he does not claim to have been misled or surprised by their testimony.

By his affidavit he claims that the Carriboos could have covered this point by their testimony. He says he had their "promise and assurance" to be present "and testify concerning deponent's settlement, residence and improvements" upon the land; that one of them was present and assisted in making the clearing in August, 1891, and both "are cognizant of the settlement by deponent in August, 1891, and the maintenance of residence upon said land from the time of settlement aforesaid to the present time;" that he had found them trustworthy and believed they would be present. The contestant admitted that these persons would "testify to the statement set out." It seems to me that claimant could not ask for more than this. If these witnesses would thus testify, then the final proof taken, in connection with the admission, was sufficient as between the parties, to raise the issue, and the contestant had a right to be heard.

In view of this, the action of the claimant in refusing to be cross-examined and take any further part in the controversy was, in my judgment, entirely inexcusable. He was in no wise prejudiced by the action of the contestant or the local officers. In his first effort to make final proof he was met by a contest upon substantially the same grounds as the second. He avoided that, on the ground of the absence of Gorden. The second contest was filed some eighteen days before his final proof could be offered under his notice, and it was not submitted until seven days thereafter. Thus it would seem as if he had sufficient time in which to prepare for the trial.

In addition to this, it may be said that there is no law or rule of the Department that would warrant the local officers in extending the time for taking final proof beyond ten days from the time named in the advertisement (General Circular, February 6, 1892, par. 13, p. 62). Hence it was not error in your office to sustain the action of the local officers in overruling the motion for continuance, and proceeding with the trial (see *Boord v. Girtman*, 14 L. D., 516).

The testimony submitted by the contestant shows that Dawkins, during the period that he claims to have lived upon his homestead, was engaged in the dry goods business in West Superior, and that he lived in that town; that he was on the land in controversy in August, 1891; that he simply walked over the land and went back to Superior; that he was there again in May, 1892. Dawkins swears in his final proof that he established his residence in a tent in September, 1891, and that his house was built in October. The testimony shows that the shanty was built in September; it was about fourteen by sixteen feet, built of logs; no window; a rude door, unhung; a shed roof of poles that would not turn water; a floor of poles over part of it only; no fireplace

or stove or any furniture of any kind. When there in May, 1892, he did not stop on the land. Was there in latter part of July about eight days; did not stay on the land, but at Tucker's camp, half a mile distant. Was there again September 28, and back in Superior October 4. The shanty was in its original condition at that time, and not habitable. It is shown that there was no clearing except where the timber was cut for the shanty, and no cultivation.

It is clear to my mind that there was a mere colorable compliance with the law.

The judgment of your office is therefore affirmed.

HOMESTEAD ENTRY—VILLAGE OCCUPANCY—CONFIRMATION.

FRANCISCO MIRABAL.

The occupancy of a small portion of a subdivision of public land, under the form of a Mexican village settlement, will not operate to except the tract from homestead entry, if the land so occupied is not used for purposes of trade and business, and no claim thereto is asserted under the town-site laws.

The agreement of the homesteader in such case to protect the village settlers in their occupancy does not render the entry speculative, nor bring it within the intent of the statute which provides that entry shall not be made for the benefit of another, where it is apparent that said occupancy is not at the instance of the entryman.

A claim of confirmation under section 7, act of March 3, 1891, will not be considered where the entry is found regular and legal in all respects.

Secretary Smith to the Commissioner of the General Land Office, April 13, 1895. (F. W. C.)

I have considered the appeal of Monico Mirabal, transferee to Francisco Mirabal, from your office decision of May 24, 1893, holding for cancellation the final homestead entry made by Francisco Mirabal, covering the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ Sec. 10, T. 10 N., R. 10 W., Santa Fe, New Mexico, on the ground that said entry was illegal in its inception.

On July 17, 1883, Francisco Mirabal made homestead entry of the land in question and in the required affidavit alleged settlement on December 5, 1878, upon said land. He made proof after due notice by publication on November 28, 1884, against the acceptance of which no protest or objection was made, and the same was duly accepted by the local officers and final certificate No. 122 issued on December 1, following.

Upon an application by Manuel Brito, in which it was alleged that a part of the village Ago Del Gallo occupied a portion of the land in question, a hearing was ordered in order to determine the rights under the adverse occupation of said village.

At the time and place set for the hearing, although due notice was given the settlers on the land, no appearance was entered on account of the occupants, and upon the *ex parte* testimony offered in support of Mirabal's entry the register and receiver found in their decision of February 17, 1887, that about one-fourth of the inhabitants of the said

village were living upon the tract in question and that the same had not been used for the purposes of business and trade, except that one Dumas Provencher, one of the settlers, for a time kept a store upon the land, and at the time of hearing a store was owned by Monica Mirabal. Further that the entryman had agreed with the settlers living upon the land to convey to them title to the tracts claimed by each, as soon as he obtained patent, and that there had been no effort to locate the town for town purposes and that it had never been used or occupied for municipal purposes. They therefore recommended that the entry should be allowed to remain intact.

Your office decision of June 18, 1887, held said entry for cancellation for the reason that the testimony showed that the land was used for townsite purposes at the inception of Mirabal's entry. From said decision Mirabal appeals to this Department.

During the pendency of said appeal certain affidavits were filed in this Department alleging that the entry by Francisco Mirabal was fraudulently made; that his residence at the time of said entry was then forty miles from the land; that Monica Mirabal personated him at the local office in making the entry in question, and that nearly one-half of the village of San Rafael is situated on said land, the inhabitants of which were desirous of making townsite entry therefor.

In view of these charges action was suspended upon the appeal from your office decision holding said entry for cancellation and you were directed by departmental letter of October 3, 1889, to order a hearing after due notice to parties interested, or to take such other action under the laws and regulations as would enable you to ascertain the truth or falsity of such charges, and to make such order in regard to said entry as the facts may require.

Acting thereunder, your office directed the local officers to set a time and place for the hearing of which due notice was given all parties, which hearing appears to have been regularly held.

Upon the testimony adduced the register and receiver rendered the following decision, after reviewing the testimony of the several witnesses:

It would be a waste of time to enter into an analysis of the evidence in this case, as all the witnesses, however they may disagree on other points are unanimous in saying that houses were built and people were living on the land in question at the time Francisco Mirabal made homestead entry No. 1961, and that a town has existed there ever since and hence was not subject to homestead entry.

Upon appeal your office decision of May 24, 1893, sustained the decision of the local officers and in said decision it is stated that:

This land has been occupied as a portion of the village of San Rafael since 1869; said village has a population of from two to three hundred souls. When the entry was made by Mirabal in 1883 the land was not unappropriated public land and therefore was not subject to homestead entry.

From said decision an appeal has been filed that brings the case again before this Department.

An examination of the record shows a practical abandonment of the charge of impersonation in the matter of making the entry in question and but a weak effort was made to show that Mirabal did not comply with the law in the matter of residence upon the land in question, the protestants confining their opposition to the entry to the allegation that the same was a part of the village of San Rafael at the time of the initiation of Mirabal's entry and therefore not subject to such entry.

It seems that the moving spirit in opposition to the entry in question is Mrs. Provencher, the wife of Dumas Provencher, who, it appears, was dispossessed of a certain house and enclosure claimed by her upon the land in question, upon an action brought by Monica Mirabal, but aside from her none of the occupants of the land in question comprising a part of the village of San Rafael appeared, to offer testimony against the entry in question. In this connection it might be noted that Dumas Provencher was the principal witness introduced in support of Mirabal's entry. He has since died and the testimony given in the present hearing by his wife, so far as material, seems to be in direct conflict with the testimony given by him.

There appears to be but little question upon the facts in the case. As early as 1869 one Rafael Chaves settled upon this and an adjoining tract, for which he filed pre-emption declaratory statement upon October 25, 1873. At the instance of Chaves a number of Mexicans settled upon, built houses, and occupied a portion of the land covered by his pre-emption claim. This Mexican village so formed, does not appear to have ever been organized in any way and no claim under the townsite law has ever been made on account of the occupation as alleged.

Among the early settlers was Francisco Mirabal and after Chaves abandoned his claim Mirabal made entry as before stated. The village settlement referred to comprises between four and five acres in the western part of the tract in question and extends across the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said Sec. 10, for which it appears that one Telles has made entry under the homestead law and received patent. Francisco Mirabal agreed to give title to each of the occupants of a portion of his entry in question, to the land occupied and claimed by them, and his transferee has likewise agreed to protect the occupants in their possession.

The first question for consideration is whether the land, a portion of which was occupied as before set forth, was, at the time of the making of Mirabal's entry, subject to the operation of the homestead laws.

In the case of *Keith v. Townsite of Grand Junction*, on review (3 L. D., 431), it was held on the authority of the rulings in the case of the townsite of Superior City (1 Lester, 432), that it was manifestly not the object of the law to withhold from pre-emption such lands as individuals might designate or select without authority, as a site for a probable or prospective city or townsite. And in the case of *Bickel*

et al. v. Irvine (10 L. D., 205), the homestead entry by Irvine was sustained although a portion of the land was shown to have been occupied for a number of years prior to the making of the entry there in question, the settlement being known as Carson Camp. In that case it was stated by your office decision that—

the occupants or residents of the tract in controversy never in any manner indicated that they desired to obtain title to the tracts from the government under the townsite or other laws. . . . At the date of Irvine's entry the townsite protestants had acquired no rights against the United States and there was no appropriation of the public lands by the settlement they had made.

In the departmental decision in that case it was stated that the contestants took no legal steps to enter the lands covered by their settlement under the townsite law, nor do they now ask it; and since it is not shown that any part of the land was settled upon and occupied for purposes of trade and business at the time of Irvine's entry, I concur in the conclusions expressed in your said office decision.

These decisions would seem to be conclusive of the case at bar. While a portion of the land was occupied at the time of Mirabal's entry, yet it does not appear to have been used within the meaning of the statute for the purposes of business and trade, and as the occupants have taken no legal steps to enter the land covered by that settlement under the townsite laws, I must hold that their occupancy was not sufficient to reserve the land from disposition under the settlement laws.

It but remains to consider the effect of the agreement made between Mirabal and the settlers upon this land under which he agreed to give them title to the portion of the land respectively occupied by them. When the peculiar facts relative to the settlement of Mirabal and the other Mexicans upon this and the adjoining tract are considered, I can find no reason for avoiding Mirabal's entry on the ground that he promised to protect those who were settlers upon the land, in their respective occupations. It is clear that they did not settle upon the land at his invitation and his agreement to protect them can not be construed into a speculation, nor does it bring him within the intention of the statute which provides that entry shall not be made in the interest of any other party.

In this connection it might be stated that Monico Mirabal claims protection under the provisions of section seven of the act of March 3, 1891 (26 Stat., 1095), claiming that he is entitled to have the entry confirmed, he having been a *bona fide* purchaser after final entry, and that his purchase antedated March 1, 1888.

Having found the entry to be regular and legal a consideration of the claim of confirmation is unnecessary. I must therefore reverse your office decision and direct that the entry in question be passed to patent.

LANGFORD *v.* BUTLER.

Motion for review of departmental decision of January 30, 1895, 20 L. D., 76, denied by Secretary Smith, April 13, 1895.

CLASSIFICATION OF MINERAL LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., April 13, 1895.

To the Commissioners to classify Mineral Lands, and to the Registers and Receivers, U. S. Land Offices at Helena, Bozeman, and Missoula, in Montana, and Coeur d'Alene in Idaho:

In accordance with the authority vested in me by an act of Congress approved February 26, 1895, entitled "An Act to provide for the examination and classification of certain Mineral lands in the States of Montana and Idaho", I have prepared the following rules and regulations for your observance and direction in the performance of the duties devolving upon you under said act.

I. As soon as the commissioners appointed under the second section of said act are officially advised of their appointment, they will qualify before an officer having a seal, and duly authorized to administer oaths, by taking and subscribing the usual oath of office, and filing the same with the Commissioner of the General Land Office.

II. Your several boards are, as required by the statute, composed of three members, any two of whom shall constitute a quorum for the transaction of business. From each board the Secretary of the Interior will designate a chairman and secretary. The secretary shall keep the minutes and a record of your proceedings. The minutes of each day's proceedings shall be completed and written out in ordinary handwriting, or typewritten, and duly signed by the chairman and secretary before the next day's business shall be begun, and shall not thereafter be changed, except by a further record, stating accurately the changes intended, said minutes not to include testimony or evidence taken under the second section of the act, or other than actual decisions, orders and proceedings of the board.

The decision or action of a majority of each board shall control in all matters herein provided for.

III. Commissioners can obtain all plats and information necessary to enable them to proceed with their duties, at the local offices, from time to time, as their work progresses.

IV. You will at once proceed to examine and classify the lands as provided in the said act, in the following order and manner:

a—You will commence with those surveyed tracts, which are *prima facie* non-mineral lands, observing as nearly as practicable, a consecu-

tive order in the examination, to the end that the grants may be adjusted in this particular, as rapidly as is consistent with accuracy.

b—The examination in the field shall be as to each forty acre subdivision, and you will note carefully as evidence, any testimony offered, or facts observed, relative to each particular tract or to tracts adjacent thereto.

c—"That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase, under the provisions of the United States mining laws, and the Commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location or character."

From the examination and classification shall be eliminated all tracts for which United States patent has issued, as mineral or agricultural, but note shall be taken of all subdivisions containing patented mining claims, as by the third section of the act the remaining portions of such subdivisions are declared to be *prima facie* mineral and must be classified as such unless the character thus impressed upon them is disproven by testimony or otherwise.

d—Whenever you are in doubt as to proper classification of any particular tracts of land, you may avail yourselves of such evidence as may be accessible to you, or summon and take the testimony of such witnesses as you may deem necessary.

e—Attention is called to the fact that as this is a final determination of the character of the lands, as far as the commissioners are concerned, the various boards should freely avail themselves of all testimony, formal or informal, likely to aid them in making an accurate classification, as a fair and reasonable classification will render improbable much vexatious and expensive litigation under the fifth and succeeding sections of the act. The examination should be made as rapidly as is compatible with thoroughness, and all obviously irrelevant testimony should be rigorously excluded.

f—After examination has been made, and all information required has been obtained, classification shall be made and the minutes of the board containing the decisions as to the conclusions reached, shall state that the lands classified are examined by legal subdivisions, (where the lands have been surveyed), (and where unsurveyed; by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the commissioners, may determine), and give the area thereof.

In making this classification certain definite requirements of the act not already noted must be observed:

1. The word "mineral" as used in the act shall not be held to include coal and iron.

2. The classification shall be made without reference to any previous examination or report, or classification.

V. On or before the 5th day of each month you will file with the register and receiver of the land office in which the land examined and classified is situated, a full report in duplicate, in form as follows:

EXHIBIT A.

DEPARTMENT OF THE INTERIOR, U. S. LAND OFFICE,
_____, _____, 189—.

Report of certain lands within the land grant limits (or within the indemnity land grant limits) of the Northern Pacific Railroad Company, within the district above named, examined and classified in accordance with an act of Congress approved February 26, 1895, entitled "An Act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho":

Lands Classified as Non-mineral.					Lands Classified as Mineral.				
Sub Division.	Section.	Township.	Range.	Remarks.*	Sub Division.	Section.	Township.	Range.	Remarks.*

* In case any tract described in the foregoing statement was classified after consideration of testimony offered by witnesses, under the head of remarks should be made a reference by page to those portions of Exhibit B containing the testimony and decisions relative to the particular tract.

EXHIBIT B.

DEPARTMENT OF THE INTERIOR, U. S. LAND OFFICE,
_____, _____, 189—.

The following exhibit is submitted as additional and supplemental to the detailed lists of lands examined and classified by the Board of Commissioners shown on Exhibit A of even date herewith.

Here insert a report concerning the following particulars:

1. All testimony referred to, and written communications received by said Commissioners relating to the land embraced in the report, carefully arranged in consecutive order that reference may readily be made thereto on Exhibit A.

2. An abstract of these portions of the minutes of the board (giving the dates) showing the various decisions and orders affecting the classification of each forty acre tract described in the detailed list (Exhibit A).

3. A full explanation of the reasons for the specified classification of lands where no testimony or other evidence appears under paragraph 1 of this exhibit.

4. Any further remarks necessary and not provided for.

5. A certificate as follows:

It is hereby certified that the foregoing report, Exhibits A and B—of the lands examined and classified by the Board of Commissioners for the Land District of _____ from _____ 189— to and including _____ 189— together with an abstract of decisions, the evidence filed, etc., is a true and correct record of the proceedings had during the period specified, both dates included.

(Signed,)

_____,
Commissioner.

6. The report containing the testimony or other evidence filed under 1, should be marked "original" for retention in the local land office, and the duplicate marked "duplicate" prepared for transmittal to the Department should omit the testimony, and written communications provided for by subdivision 1 of this section, which may be called for from the land office by the Secretary at any time with such further reports as may be deemed necessary.

VI. The commissioners shall thereupon proceed to examine and classify all other surveyed lands, in their order, in the same manner as provided by section four of the act; and thereafter shall as rapidly as practicable examine and classify in the same manner all unsurveyed lands in their respective districts within said grants, observing the difference that the lands must necessarily be described by natural objects or permanent monuments to identify the same, returning the area of unsurveyed tracts classed as mineral.

In this connection it is only necessary to direct that the unsurveyed tracts examined under one description be of comparatively small extent, the details relative to the description thereof being left to the discretion of the several boards.

VII. (a) Immediately upon the filing of said report in their office, the register and receiver will forward the duplicate direct to the Secretary of the Interior, and thereupon publish in two newspapers, one of general circulation in the county in which the land classified is located, and the other published at the capital city of the State (in which the lands may be situated) at least once a week for four consecutive weeks if in a weekly paper, which will require five insertions in a weekly paper, (or for thirty days if in a daily paper) notice of the classification shown by said report filed by said commissioners, as follows:

DEPARTMENT OF THE INTERIOR, U. S. LAND OFFICE,
_____, _____, 189—.

A report in duplicate, marked Exhibits A and B, having been filed in this office on the _____ day of _____ 189—, by the Commissioners appointed for this land district under an Act of Congress approved February 26, 1895, entitled "An Act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho," showing the classification of lands within the land grant limits (or the indemnity land grant limits) of the Northern Pacific Railroad Company, made by said Commissioners from _____ 189—, to _____ 189—, both dates inclusive, as follows:

(Here insert verbatim Exhibit A.)

Notice is hereby given in compliance with the fifth section of said act that any person, corporation or company feeling aggrieved by said classification may within sixty days after the date of the first publication hereof file in this office a duly "verified protest against the acceptance of said classification which protest shall set forth in concise language the grounds of objection as to the particular (government subdivision of) land in said protest described", whereupon an order for a hearing shall issue.

That portion of the report of the Commissioners marked Exhibit B is on file in this office and open to the examination of interested parties.

Notice is further given that by the terms of said act of February 26, 1895, "that as to the lands against the classification whereof no protest shall have been filed" . . . "the classification when approved by the Secretary of the Interior, shall be considered final except in case of fraud".

_____,
Register.

_____,
Receiver.

(b) Hearings on protests filed in pursuance of such published notice, shall be conducted in accordance with the Rules of Practice, edition August 6, 1894, and with paragraphs 109 *et seq.*, of the general mining circular of December 10, 1891, amended by the circular approved July 2, 1894, so far as the same are applicable, with these modifications:

1. It being contemplated that the classification proceed to a conclusion as soon as practicable, the time for filing appeal from the decision of the register and receiver, upon testimony submitted on said protests, is limited to ten days, and from the decision of the Commissioner of the General Land Office to twenty days, the usual additional time being allowed for service.

2. It being provided by the sixth section of the act that the unsuccessful party on final decision shall pay all the costs of such hearings, the registers and receivers will require from each litigant a preliminary deposit of a sum of money sufficient to cover the whole costs properly chargeable of which gross amount any excess over double the costs of the hearing shall be returned to the respective parties immediately upon the conclusion of the said hearing, one half the sum then remaining be refunded to the successful party immediately upon official notice being received at the local land office of the final determination of the controversy, and the net costs be then immediately disposed of in the usual manner. Until such final determination of the matters in issue the amounts so deposited shall remain in the custody of the receiver of public moneys for the land district in which said matter is pending, who shall issue his receipt therefor to the respective parties.

With his regular monthly report said receiver shall include a report of all moneys so received and remaining in his hands.

3. The lands included in the lists reported by the various Boards of Commissioners, and incorporated in the published notice are *prima facie* of the character as classified and the Secretary of the Interior, upon receipt of the report provided for in paragraph IX. (b) will designate, under the proviso to the fifth section of the act, the official, to

defend such classification, at said hearings in the name of the United States, fixing the compensation to be paid for said services.

4. The orders for the hearings provided for by said act shall issue to the protestant, upon his application, and be by him served upon all parties in interest in the usual manner. Should application for such order be not made within ten days from the filing of said protest, said protest shall be considered as dismissed.

VIII. The registers and receivers shall in all hearings arising under this act fix as early a date therefor as is practicable, not later than thirty days thereafter, said hearings to be held on consecutive business days, and the record in each case be kept separate from any other.

IX. (a) The registers and receivers shall immediately upon the expiration of the time within which protests may be filed, specified in paragraph VII, make a full report, specifying in detail all lands embraced in said published list "Exhibit A" against which no protests have been filed as provided, and also specifying in detail all lands embraced in said published list "Exhibit A" against which protests have been filed, to the end that all lands as to which no controversies exist may be speedily and finally classified as to their mineral or non-mineral character.

(b) The register and receiver shall, as soon as possible make an additional report specifying the protests on which hearings have been ordered and the dates fixed therefor, and also specifying the protests which are dismissed for want of prosecution.

X. The duplicate report of the commissioners provided for by section five of the act shall be forwarded directly to the Secretary of the Interior. All other reports and correspondence shall be addressed to the Commissioner of the General Land Office, and only through him to the Secretary, so that a complete record thereby may be kept in the General Land Office.

XI. (1) On the first day of each month the several boards of commissioners shall file with the receiver for the land districts in which they are appointed, a full report in duplicate, signed by the president and secretary of said board, for transmittal to the Secretary of the Interior in the manner prescribed by section X of these instructions. Said report shall show in detail the amounts due each member of the respective boards as compensation for services for the prior month, under said act, accompanied by the receipts in duplicate of the individual members, signed in blank.

(2) With their regular monthly returns the various receivers shall transmit these several reports, together with all accounts for publication under the fifth section of the act, and accounts under the proviso to the fifth section of the act, which should be filed with them. These last named accounts must be sworn to before some officer authorized to administer oaths in the land district, the account for publication have attached a copy of the notice published, and all be accompanied with receipts in duplicate signed in blank.

These various accounts will then be audited as provided by section 2 of the act.

XII. The charges for publication under this act shall not exceed the charges fixed for publication for mining claims as specified in paragraph 97, Sec. 1 of the mining circular of December 10, 1891, and shall be payable as in said act prescribed, upon due proof of publication filed in manner as prescribed by paragraph 41 of said mining circular of December 10, 1891.

XIII. Such further instructions under said act will be issued as may hereafter appear necessary, but should unforeseen difficulties present themselves, you will submit the same for special instructions.

The blanks necessary to be used in connection herewith will be furnished.

A copy of said act of February 26, 1895, is attached.

Very respectfully,

HOKE SMITH, *Secretary.*

[PUBLIC—No. 76.]

AN ACT To provide for the examination and classification of certain mineral lands in the States of Montana and Idaho.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and is hereby, authorized and directed, as speedily as practicable, to cause all lands within the land districts hereinafter named in the States of Montana and Idaho within the land grant and indemnity land grant limits of the Northern Pacific Railroad Company, as defined by an Act of Congress entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," approved July second, eighteen hundred and sixty-four, and Acts supplemental to and amendatory thereof, to be examined and classified by commissioners to be appointed as hereinafter provided, with special reference to the mineral or non-mineral character of such lands, and to reject, cancel, and disallow any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any lands in said land districts which upon examination shall be classified as provided in this Act as mineral lands.

SEC. 2. That for the purpose of making the examination herein provided for there shall be appointed by the President of the United States, as soon as practicable after the passage of this Act, three commissioners for each of the following land districts, to-wit: The Bozeman, Helena, and Missoula land districts, in the State of Montana, and the Cœur d'Alene land district, in the State of Idaho, at least one of whom for each district shall be a practical miner and a resident of such district; and said persons so appointed for each district shall constitute a board of commissioners to perform within such district the duties herein prescribed. They shall each receive for their compensation ten dollars for each day they may be actually engaged in the performance of their duties, which shall include their transportation and subsistence expenses, but the total amount of compensation to be paid to each commissioner annually shall in no case exceed the sum of twenty-five hundred dollars; and their accounts shall be audited by the Secretary of the Interior and paid monthly. Before entering upon their duties each of said commissioners shall take an oath to faithfully perform the duties of his office. Said commissioners shall make examination

of the lands herein mentioned within their respective districts, and may also take the testimony of witnesses as to the mineral or non-mineral character of any of said lands, and receive any other evidence relating to said matter, and shall have power to summon witnesses to appear before them, and to administer oaths; and they shall, immediately upon their appointment, proceed to examine and classify the lands herein mentioned within their respective districts, as provided in this Act, and shall fully complete said classification within the term of four years from the date of this Act. The oath of office of said commissioners shall be filed by them in the office of the Commissioner of the General Land Office. All testimony taken by said commissioners shall be reduced to writing, subscribed by the witnesses, and filed with the report of the commissioners hereinafter required. The action or decision of a majority of said commissioners in each district shall control in all matters herein provided for. That the commissioners shall perform the work of examination and classification herein directed according to such rules and regulations as the Secretary of the Interior shall prescribe.

SEC. 3. That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character. The classification herein provided for shall be by each legal subdivision where the lands have been surveyed. If the lands examined are not surveyed, classification shall be made by tracts of such extent, and designated by such natural or artificial boundaries to identify them, as the commissioners may determine. Where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the forty-acre subdivision within which it is located is mineral land: *Provided*, That the word "mineral," where it occurs in this Act, shall not be held to include iron or coal: *And provided further*, That the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification thereof.

SEC. 4. That such of the lands herein mentioned as have been surveyed prior to the passage of this Act shall be first examined and classified as herein provided, and afterwards, and as speedily as practicable, the lands herein mentioned which have not been surveyed, until all the lands herein mentioned shall have been examined and classified, as herein provided.

SEC. 5. That said commissioners shall, on or before the fifth day of each month, file in the office of the register and receiver of the land office of the land district in which the land examined and classified is situated a full report, in duplicate, in such form as the Secretary of the Interior may prescribe, showing all lands examined by them during the preceding month, and specifying clearly, by legal subdivisions, where the land is surveyed, or otherwise by natural objects or permanent monuments to identify the same, the lands classified by them as mineral lands and those classified as non-mineral; and with said report shall be filed all testimony taken and written communications received by said commissioners relating to the lands embraced in the report. The register and receiver shall file one duplicate of said report in their office, together with all accompanying testimony and papers, and the other duplicate shall be by them forwarded direct to the Secretary of the Interior, and said commissioners shall furnish to the Secretary of the Interior at any time such further or additional report or information as he may require concerning any matters relating to their duties or the performance of the same. Upon receipt of such report the register of the land office shall, at the expense of the United States, cause to be published in a newspaper of general circulation in the county in which the land is located, and in one newspaper published at the capital city of the State

in which the lands may be situated, at least once a week for four consecutive weeks, notice of the classification of lands as shown by said report, and any person, corporation, or company feeling aggrieved by such classification may, at any time within sixty days after the first publication of said notice, file with the register and receiver of the land office a verified protest against the acceptance of said classification, which protest shall set forth in concise language the grounds of objection to the classification as to the particular land in said protest described, whereupon a hearing shall be ordered by, and conducted before, the said register and receiver, under rules and regulations as near as practicable in conformity with the rules and practice of such land office in contests involving the mineral or non-mineral character of the land in other cases; and an appeal from the decision of the register and receiver shall be allowed to the Commissioner of the General Land Office and the Secretary of the Interior, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at such hearings the United States shall be represented and defended by the United States district attorney or his assistants for the judicial district in which the land is situated, unless the Secretary of the Interior shall detail some proper officer of the Department of the Interior for that purpose. The compensation for such service shall not exceed ten dollars per day for each day's actual service before the register and receiver, to be paid out of the fund provided for the examination and classification of said mineral lands.

SEC. 6. That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification. All lands so classified as above without protest, and the classification whereof is disapproved by the Secretary of the Interior, and all lands whereof the classification has been invalidated for fraud, shall be subject to hearing and determination in such manner as the Secretary of the Interior may prescribe. And as to all such lands, and as to the lands against the classification whereof protests may be filed, the final ruling made after the day set for hearing shall determine the proper classification; and all records of the local and general land offices shall be made to conform to the classification as determined by such final ruling, and all costs of such hearings shall be paid by the unsuccessful party, under such rules as the Secretary of the Interior may prescribe; and the Secretary of the Interior is hereby authorized to establish such rules and regulations as may be necessary to carry into effect the true intent and provisions of this Act as speedily as practicable.

SEC. 7. That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company for any land in said land districts until such land shall have been examined and classified as non-mineral, as provided for in this Act, and such patent or other evidence of title shall only issue then to such land, if any, in said land districts as said company may be, by law and compliance therewith and by the said classification, entitled to, and any patent, certificate, or record of selection, or other evidence of title or right to possession of any land in said land districts, issued, entered, or delivered to said Northern Pacific Railroad Company in violation of the provisions of this Act shall be void: *Provided*, That nothing contained in this Act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in any wise affecting any right on the part of the United States against the said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company.

SEC. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of twenty thousand dollars, or so much thereof as may be necessary, to be expended to carry into effect the provisions of this Act, the same to be paid out upon the order of the Secretary of the Interior; and the Secretary of the Interior is hereby required to embrace in the annual estimates submitted

to Congress for appropriations for the Interior Department a sufficient sum to pay the said commissioners for the fiscal year next ensuing, and annually thereafter until the classification of lands required by this Act has been fully accomplished.

Approved, February 26, 1895.

PRACTICE—HEARING—DISCRETION OF COMMISSIONER.

TOWN OF AMARGO *v.* VORHANG.

The Secretary of the Interior will not interfere with the discretion of the Commissioner in refusing to order a hearing, unless there is such an abuse of discretion as would work an injustice, or an inequitable denial of a legal right.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (J. I. P.)

By letter "G" of March 12, 1894, your office transmitted to this Department the appeal of certain inhabitants of the town of Amargo, New Mexico, from your office decision of November 16, 1893, refusing to order a hearing on the protest of said inhabitants filed against the final proof offered on Ed A. Vorhang's homestead entry No. 3879, covering the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 31 N., R. 1 W., and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 36, T. 32 N., R. 1 W. Santa Fe, New Mexico, land district.

It appears that at the time Vorhang made application to enter the tract here involved the inhabitants of said town of Amargo filed a protest against the allowance of said entry, and that by your office letter "G" of November 20, 1891, the case was decided in favor of Vorhang, and his entry allowed to be made of record.

The reason given in the decision appealed from for declining to order a hearing on the protest under consideration is because the questions therein presented are the same substantially as were adjudicated by your office in its letter "G" of July 20, 1891.

After setting forth the allegations contained in said protest, which I do not deem it necessary here to repeat, you declined to order a hearing thereon for the reasons stated above; but you say that the protest contains allegations which tend to show that the land is more valuable for mineral than for agricultural purposes; that these allegations are too vague and indefinite in the shape presented in said protest, and you allow the protestants thirty days within which to file a new protest affidavit on that point, and direct the local office that if the same is deemed sufficient they will order a hearing thereon.

In the case of Wilder *v.* Parker (11 L. D., 273), the policy of this Department is announced to be that it will not interfere with the discretion of your office in refusing to order a hearing on a protest filed against final proof, unless there is such an abuse thereof as would work an injustice or an inequitable denial of a legal right.

A careful examination of the record in this case shows that the question of the time of Vorhang's settlement on the tracts in question, his residence thereon, the character of his improvements, the use he has made of the land, the origin of the town, its first occupation of said tract, and all other questions in issue between the inhabitants of said town and Vorhang at that time, were adjudicated in your said office decision of July 20, 1891, and that the protest in question is but a re-opening of these issues. Hence a refusal to order a hearing thereon works no injustice to said inhabitants, nor does it deny them a legal right, as they have had their day in court. I see no reason, therefore, why the policy of the Department, as stated in the authority cited, should be departed from in this instance.

Your office decision is therefore affirmed, with instructions to renew the permission to the protestants to file a new protest, alleging the mineral character of the land, and that a hearing may be had on that point only.

ADDITIONAL HOMESTEAD—SECTION 6, ACT OF MARCH 2, 1889.

HORACE J. JACKETT.

An additional homestead entry under section 6, act of March 2, 1889, is limited in acreage to an amount which added to the quantity previously entered shall not exceed one hundred and sixty acres.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (P. J. C.)

The record in this case shows that Horace J. Jackett filed application to make homestead entry, under section 6 of the act of March 2, 1889 (25 Stat., 854), of the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 3 and 4, of Sec. 9, T. 20, R. 45, containing 103.50 acres, Alliance, Nebraska, land district.

By said application it is shown that the entryman had made homestead entry of lots 1 and 2, of section 6, T. 23, R. 38, which contained 80.50 acres, and that he had commuted the same by warrant location, under the act of February 11, 1847, and that a patent was issued thereon July 21, 1887.

The application in question was rejected by the local officers for the reason that it "calls for more land than applicant is entitled to under the law."

The applicant appealed to your office, which, by letter of December 11, 1893, held—

This application is made under the provisions of section 6 of the act of March, 1889, which prescribed that the "additional land" which "added to the quantity previously entered . . . shall not exceed one hundred and sixty acres."

Your action was, under the circumstances, proper, but I have concluded to allow the applicant the option, within the time prescribed, under the rules of practice for taking an appeal to elect whether he will take an appeal, or waive any claim to so much of the tract applied for, as to bring the remainder, when added to the tract previously entered, within the area prescribed by law.

The applicant's appeal from this judgment brings the case before the Department.

Upon an examination of the record I find your office judgment to be correct, and the same is hereby affirmed.

COMMUTED HOMESTEAD ENTRY—EQUITABLE ACTION.

FRANCIS A. LOCKWOOD.

Modified,
21 Dec 200
The board of equitable adjudication has no authority to waive the requirement of the statute that permits the commutation of a homestead only after a period of fourteen months residence and cultivation from date of entry, and confirm an entry allowed in contravention of said statutory requirement.

Secretary Smith to the Commissioners of the General Land Office, April 18, 1895. (J. L.)

The land involved in this case is the NW. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 7, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 8, T. 28 N., R. 25 E., Waterville land district, Washington.

On March 18, 1891, Francis A. Lockwood made homestead entry, No. 150, of said land. On August 12, 1891, he filed notice of intention to make final proof on September 23, 1891; on which day, after due publication, he offered the testimony of himself and of two witnesses and proved—

that he settled upon said land about the middle of May 1890; built a house and moved into it with his family, consisting of his wife and four children, and remained there until about the middle of July, when he and his family left the land and remained absent until about November 3, 1890; they then returned to the land and remained several days until about the middle of November 1890; at which time they left the land again, and remained absent until April 6, 1891, when they returned; from April 6 to September 23, 1891, the entryman and his family remained upon the land. When absent from the land as above stated the family stayed in Waterville for the purpose of sending the children to school. (The testimony as to the improvements and cultivation appears to be sufficient.)

The local officers approved said final proof and permitted Lockwood to make cash entry, No. 271, of said land, and issued to him final receipt and certificate dated September 23, 1891.

On May 12, 1892, your office (by letter C of that date) suspended said cash entry "for the reason that proof was not made in conformity with section 6 of the act of March 8, 1891 (26 Statutes, 1095), which requires fourteen months residence from date of entry;" said "Cash Entry No. 271 dated September 23, 1891, being a commutation of homestead entry No. 150 made March 18, 1891." Your office further instructed the local officers to "notify the entryman that when he can show such residence he will be permitted to submit supplemental proof without readvertising."

From said decision Lockwood appealed. And on March 15, 1893, this Department approved and affirmed the action and decision of your office. The case is reported in 16 L. D., 285.

Lockwood was served with a copy of said departmental decision on April 11, 1893, and he has not taken any action in reference thereto. But on December 14, 1893, one C. W. French (appearing by P. E. Berry, Esq., who was attorney for Lockwood), forwarded to your office a petition in which he alleged, that on April 25, 1892, he purchased from Lockwood for valuable consideration and in good faith, the land aforesaid, and is the present owner thereof; and that it is impossible for Lockwood now to make a non-alienation affidavit; and thereupon he prayed that the aforesaid case be submitted to the board of equitable adjudication as a "special case," and that patent issue to Lockwood for said land.

On January 20, 1894, your office denied the prayer of said petition, and held Lockwood's cash entry, No. 271 for cancellation; and French has appealed to this Department.

I find no error in the proceedings of your office. The board of equitable adjudication have no authority to repeal or suspend the operation of the act of Congress which provides, that a homestead entryman may avail himself of the privilege of paying the minimum price for his land, *only* "after the expiration of fourteen calendar months from the date of his entry," and then *only* "upon making proof of settlement, and of residence and cultivation for such period of fourteen months."

Your office decision is hereby affirmed.

UMATILLA LANDS—CULTIVATION—GRAZING LAND.

JOHN M. ALLEN.

The use of land for grazing purposes by the entryman is sufficient compliance with the law as to cultivation, if the land is better suited to such use than to raising crops; and it is not material in such case whether the stock so grazed on the land is the property of the entryman or not.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (I. D.)

John M. Allen appeals from your office decision of November 3, 1893, holding for cancellation his Umatilla cash entry, for lots 3, 4, 9, and 10, Sec. 13, T. 1 S., R. 32 E., La Grande land district, Oregon.

An inspection of the papers shows that by an inadvertence your office decision omits lot 1, of Sec. 14, of the same township and range, which is included in the entry in final proof, and the entire tract will be described according to his entry.

The records show that Allen made the purchase of all of said lands April 27, 1891; that he made settlement thereon October, 1891; built a house, fenced the land and resided thereon continuously until January 4, 1893, when he offered final proof. He made all the payments, the final proof payment being made on said January 4, 1893. His final

proof then offered was rejected and he was allowed further time in which to make additional proof as to cultivation and on October 18, 1893, he filed additional proof showing that said land was used for grazing purposes, 2,500 sheep and 25 dairy cows being pastured thereon. The stock so pastured is the property of two other persons and none of it seems to belong to the entryman. The proof filed January 4, 1893, shows that the tract was unfit for plow land and only available for grass land.

The entryman has complied with the law fully as to payments, residence, and improvement, and the final proof showing, without dispute, that the land is more valuable for grazing than for plow land, his use of such land for pasture is sufficient compliance with the law as to cultivation.

Where land is better adapted for grazing than for raising crops, the erection of the necessary buildings and preparation for stock raising, together with the actual use of the land for such purpose may be accepted as satisfactory proof of cultivation, if good faith is also shown in complying with other requirements of the law. Michael McKillip (17 L. D., 455).

Whether the stock raised and grazed upon the land belongs to the entryman, or he raises and grazes stock thereon for others at a profit for his work and the use of the land, seems not to be material. Having made full payment for the land and in all other respects having complied with the law, his final proof should have been accepted.

Your office decision is reversed and Allen's final proof is accepted.

ORDER OF CANCELLATION—REINSTATEMENT.

PEHLING *v.* BREWER.

An entryman who fails to appeal from a decision canceling his entry, and permits said decision to become final, is not entitled to a reinstatement of his entry, in the presence of an intervening adverse right, even though the original judgment of cancellation was erroneous.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (E. W.)

The plaintiff in the above stated case appeals from your office decision of April 12, 1893, holding his entry for cancellation as to part in conflict with the entry of defendant. The land involved in this controversy is described as follows: N $\frac{1}{2}$ of SW $\frac{1}{4}$ and SW $\frac{1}{4}$ of NW $\frac{1}{4}$, Sec. 18, T. 110 N., R. 29 W., Marshall land district, Minnesota.

It appears that Brewer made soldiers additional homestead entry upon the tract in controversy on January 12, 1874, and that subsequently on November 21, 1876, the same was claimed by the State of Minnesota under the swamp land act of March 12, 1860. It further appears that the entry of Brewer was cancelled by your office on July 30, 1878, for conflict with the swamp selection of said State. From this decision of

your office defendant Brewer has never taken an appeal. The tract in controversy was within the six miles granted limits of the Winona and St. Peter Railroad under the Act of March 3, 1857, and were reserved double minimum lands at the date of said swamp-land grant and did not pass thereunder. For this reason your office held for rejection the selection of the State of Minnesota subject to the right of appeal. No appeal having been taken the selection was rejected on the 22d of October, 1892.

Henry Pehling made homestead entry upon the tract, January 12, 1893. Upon application made to your office subsequent to the date of Pehling's homestead entry, the cancellation of Brewer's entry made in 1878 was rescinded and his entry reinstated to be considered with a view of passing it to patent. Pehling was then called upon to show cause within thirty days from notice why his entry should not be cancelled for conflict with the entry of Brewer. In response to said notice Pehling made affidavit, duly corroborated, setting up that he made his entry in good faith without knowledge that Brewer had any rights or equities in said tract, or that he had made any claims thereto, and that since 1874 he had known Brewer, during which time Brewer had never occupied or improved the same. Pehling further states in his affidavit that he had made inquiry as to the status of the tract in dispute and was informed by the local officers that there had previously been a claim of the State of Minnesota to the tract under the swamp-land grant of 1860, but that the same had been cancelled in 1892, and that the land was vacant government land; and that relying upon this information he made his homestead entry.

In view of these facts, among other things your office decision says:

As said entry was cancelled by this office through inadvertence, it was manifestly proper that it should have been reinstated upon the discovery of the error. Brewer's entry having been cancelled through no fault of his, Pehling's entry can not be regarded as such an intervening adverse claim as would preclude the reinstatement of the former's entry.

It is further held in your office decision as follows:

It is true that Pehling has been misled by letters emanating from this office and by the records of your office, and that he made entry for a tract to which he had reason to believe that there was no prior adverse claim. While the claim of Brewer for this tract must be held to be valid, Pehling should not be made to lose his homestead right. Therefore he will be allowed to relinquish his entry and have it cancelled without prejudice to his making a second homestead entry. But if he desires to retain the forty acres, not in conflict with Brewer's entry this must be in full satisfaction of his homestead right.

However, Pehling's entry is hereby held for cancellation as to the part in conflict with Brewer's entry, viz: N $\frac{1}{2}$ of SW $\frac{1}{4}$, Sec. 18, T. 110 N., R. 29 W.

It thus appears that Pehling and Brewer were each acting in good faith at the time of making his homestead entry. The issue between them, therefore, is simply a legal question.

It is true that the homestead entry of Brewer was erroneously cancelled in 1878, but from this action of your office he took no appeal;

and when Pehling made his homestead entry in 1893 Brewer had yet taken no appeal, nor had he made any effort to have his entry reinstated. The land, therefore, at the time when Pehling made his entry was unappropriated public land and was subject to entry. In the case of *Dornen v. Vaughn*, 16 L. D., p. 8, it was held as follows:

When the appellant failed to appeal from the decision of November 16, 1882, holding her entry for cancellation for the tract in controversy, she acquiesced in that decision, and it became final as to her said right to the land. The question of her said right became *res judicata*, and she is barred from asserting any further right to the land under the entry, even if said decision was erroneous, in order to defeat an intervening adverse claim. *Wesley A. Cook* (4 L. D., 187); *Macbride v. Stockwell* (11 L. D., 416); *Wells on Res Adjudicata*, Chap. 1, Sec. 6.

Conceding, therefore, that the original cancellation of Brewer's entry was erroneous, he took no appeal from it and acquiesced in the decision for almost fifteen years, and for that reason his entry should not be reinstated as against the intervening adverse claim of Pehling.

Your office decision is therefore reversed.

CONTEST—RELINQUISHMENT—SECOND CONTEST.

WESTENHAVER *v.* DODDS.

A relinquishment that conforms to the requirements of the act of May 14, 1880, should be filed on presentation and the entry canceled.

The ruling that does not permit a relinquishment, filed after initiation of contest, but prior to notice, to defeat the right of a contestant to proceed against the entry, is not applicable to a second contest filed subject to the disposition of the pending suit.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (C. W. P.)

I have considered the case of John D. Westenhaver against Irwin S. Dodds, involving the latter's timber culture entry, No. 1288, (Chadron series) of the SW. $\frac{1}{4}$ of Section 35, T. 24, R. 48 W., Alliance, Nebraska. (For the early history of this case, see 13 L. D., 196.)

The record shows that this entry was made on June 25, 1889. The testimony develops these facts:—

That on the 19th of June, 1889, Jethro M. Dodds, who made timber culture entry, No. 9163, of this tract June 21, 1886, executed a relinquishment of his entry, which was mailed to the land office at Chadron the same day, and returned to said Irwin S. Dodds for correction; that on June 23, 1889, the corrected papers were mailed to the land office at Chadron, and on the 25th of June, 1889, the entry of Jethro M. Dodds was cancelled, and the application of Irwin S. Dodds to enter the land allowed.

On the 15th of June, 1889, John D. Westenhaver filed an affidavit of contest against the entry of J. M. Dodds, subject to a pending contest

of one Moore, and on the 24th of the same month, he filed another affidavit of contest, subject to Moore's contest, and his own, filed on the 15th. In his first affidavit he alleged that Dodds failed in the second year to cultivate the five acres which were broken the first year; in his second, failure to plant trees, seeds or cuttings during the third year, as required by law, and that the default continued to exist.

On the 7th of February, 1893, a hearing was ordered by your office on both charges, which was had, and the local officers held that J. M. Dodds "was not in default of compliance with the law when his said relinquishment was filed," and recommended that the entry of I. S. Dodds remain intact. Westenhaver appealed. Your office, on October 20, 1893, reversed the judgment of the local officers, and held I. S. Dodds' entry for cancellation. Dodds appealed to the Department.

The second ground of appeal from your said office decision is that your office—

Erred in not finding that the relinquishment of Jethro M. Dodds should have been filed and entry cancelled by the Hon. Reg. & Rec. U. S. Land Office, Chadron, Neb., when relinquishment was first received at Chadron Land Office, about June 20, 1889, which was prior to the filing of Westenhaver's affidavit of contest, and in which the good faith of Dodds was manifest by the error being corrected, and immediately returned to the local office at Chadron, Neb., Westenhaver's affidavit being filed between these dates or transactions.

The relinquishment is in evidence. It is endorsed on the receiver's receipt, and is as follows—

HENNINGFORD, NEBRASKA, *June 19, 1889.*

To whom it may concern—

I, Jethro M. Dodds of Henningford, Nebraska, hereby relinquish to the Government of the United States all right and title accruing to me from the within filing to the SW. $\frac{1}{4}$ of Sec. 35, Tp. 24, Rng. 48.

JETHRO M. DODDS.

This relinquishment conforms to the requirements of the act of May 14, 1880 (21 Stat., 140), and should have been filed by the local officers when received and Jethro M. Dodds' entry then cancelled. *Johnson v. Montgomery* (17 L. D., 396) and *Bradway v. Dowd* (5 L. D., 451).

The evidence shows that at that time no notice of contest had issued upon Westenhaver's affidavit of contest, filed June 15, 1889, and that neither Jethro M. Dodds nor Irwin S. Dodds knew that a contest had been initiated. The second contest affidavit had not then been filed.

The filing of a relinquishment before the issuance of notice, but *after* the filing of an affidavit of contest, does not deprive the contestant of the right to proceed against the entry. *Hall v. Beasley* (18 L. D., 92) *Webb v. Loughrey* (9 L. D., 440); *Id.* on review (10 L. D., 302). But this principle does not apply to the second contest. The evidence does not sustain the charges in the first affidavit of contest, and the view of the case taken by me renders it unnecessary to consider the evidence taken in support of the second contest.

The judgment of your office is reversed.

HOMESTEAD ENTRY—ADVERSE TOWNSITE CLAIM.

POPE *v.* TOWNSITE OF BOSSKO.

A townsite claim set up to defeat a homestead entry will not be held sufficient to reserve the land from appropriation under the homestead law, when, in fact, the land was not occupied for townsite purposes at the inception of the homestead right, and has not been so occupied at any time subsequent thereto.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (G. C. R.)

Prentis A. Pope filed his soldier's declaratory statement for the SW. $\frac{1}{4}$ of Sec. 18, T. 127, R. 51, Watertown, South Dakota, April 16, 1892, at 2:13 $\frac{1}{2}$ o'clock P. M.

On April 19, 1892, J. J. Batterton, County Judge of Roberts county, as trustee for the inhabitants of the townsite of Bossko, South Dakota, filed townsite declaratory statement for the SW. $\frac{1}{4}$ of Sec. 18 (same land as above described), and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 19, T. 127 N., R. 51 W., and the E. $\frac{1}{2}$ of Sec. 13, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 127 N., R. 52 W., alleging settlement thereon as a townsite April 15, 1892.

On October 12, 1892, Pope applied to make homestead entry, in due form, for the land located by his soldier's declaratory statement. His application was rejected by the register and receiver, because the land applied for was in conflict with the townsite declaratory statement, and a hearing was ordered to determine the rights of the parties.

The register and receiver decided that Pope was entitled to make entry of the land, and recommended that the townsite declaratory statement "be canceled, so far as it applies to the legal subdivision embraced in Pope's S. D. S."

On appeal, your office, by decision dated September 28, 1893, affirmed that action, and a further appeal brings the case here.

It is alleged that your office erred in finding:

1. That the townsite of Bossko did not, on April 15, 1893, or at any time subsequent thereto, contain one hundred inhabitants.
2. That the land has not been at any time settled upon and inhabited for townsite, business or municipal purposes.
3. That Prentis A. Pope made settlement upon the disputed tract on October 15, 1892, and has shown good faith.

This land is a part of the Lake Traverse Reservation, opened to settlement and entry by proclamation of the President, dated April 11, 1892, fixing twelve o'clock noon of April 15, 1892, "and not before," when settlers could enter the reservation, for the purpose of making entries, etc.

The evidence shows that on the afternoon of that day, a number of persons, variously estimated from fifty to two hundred, camped on a small stream (Little Minnesota river) in sections 13 and 34 (T. 128 N.,

R. 52 W). Something was said about organizing a town, and one J. Q. Burbank was selected to "interview" the county judge. On the next morning Mr. Burbank went to Wilmot, the county seat of Roberts county, and presented the petition and declaratory statement to J. J. Batterton, the county judge, who, as above seen, made the townsite filing on the 19th day of that month.

The amount of land included in the townsite application is six hundred and forty acres.

Mr. Burbank returned to the place, then called "Bossko," on the 17th of April, and began a survey of the town, and caused the land, or the major part thereof, to be platted into blocks, lots, streets and alleys. Some of this survey was carried to the land in controversy. Mr. Burbank, who appears to have been the principal manager in the organization of the town, thinks there have been from fifty to seventy-five inhabitants in the town since the first arrival on the afternoon of the 15th of April. He thought there were eight buildings in the town on October 13, 1892, and at date of hearing (January 3, 1893), he placed the number at nine; that these buildings were worth \$2,000; other improvements of the town consist of a bridge over the river, worth \$75, and a well twenty-two feet deep. He further states that the line of business carried on is livery stable, blacksmith shop, surveying and land business, wood-yard and lumber yard. He admits that he "suggested" the point for the location of the city.

A plat of the town, offered in evidence as a copy of one filed with the register of deeds for the county, shows the existence of ninety blocks, generally subdivided into twenty-four lots each; there are numerous avenues, all bearing proper names; these avenues run north and south; streets running east and west, north of Wahpeton avenue, are called "First street north," "Second street north," etc., up to North street; those south of that avenue are called "First street south," etc. Numerous parks are indicated on the plat as Minnesota Park, Violet Park, Park Reserve, etc., and numerous reservations for school purposes, public purposes, fair grounds, Riverside Reserve, etc.

Mr. Rudolph Gust, a witness for Mr. Pope, testifies he has lived on the southeast quarter of section 18 since April 15, 1892; that he is well acquainted with the town of Bossko; he enumerates the buildings therein as, a store, a hotel, a blacksmith shop, two dwelling houses, and two small barns; he gives the names of the then (January 3, 1893,) existing inhabitants of the town, making in all six and a few "outsiders." He says the store building is worth \$150, the hotel \$225; one dwelling house worth not over \$20, and "the other one" \$50; that one of the dwelling houses has never been occupied, and both are unfinished.

Witness William Brant, who lived in the town of Bossko, at date of hearing, gave a similar description of the town and its inhabitants, etc.

Mr. Burbank, the town projector, thought there were "about 20 people" living in the town at date of hearing, and about the same number in October, 1892.

It is clear from reading the testimony that the greatest number of people ever on the townsite was there on the day of the opening; that these people were not intending to settle there, but were there looking for homesteads; the plat of the town is well executed, but the town itself has no existence in fact, and I think it very doubtful that, if all the people who ever seriously intended settling there were to carry out their intentions, it could properly be dignified as a town. At all events, it is clearly shown that the number of inhabitants in the so-called town is far too small to justify the reservation of the land (640 acres) applied for.

In the circular of instructions of July 9, 1886, relative to townsites on public lands (5 L. D., 265), it is said:

When the number of inhabitants of a town is less than one hundred, the townsite shall be restricted to the land actually occupied for town purposes, by legal subdivisions.

The land in question is not occupied by any one, except the homestead applicant, and he began his residence and improvements within the required time; he is clearly entitled to perfect his entry, by reason of the date when he filed his soldier's declaratory statement; neither at that time, nor at any time since, has the land been occupied for townsite purposes.

The decision appealed from is affirmed.

PRACTICE—CONTEST—REHEARING—EVIDENCE.

CROAL ET AL. *v.* BOETLER.

In ordering a rehearing the Commissioner of the General Land Office may properly direct the submission of the testimony taken at the former hearing.

A party in whose interest a rehearing has been ordered, that does not submit evidence, but relies upon a purely technical defense must abide by his election in the event of an unfavorable judgment thereon.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (J. L.)

William Boetler has appealed from your office decision of February 2, 1894, reversing the decision of the local officers, and vacating your office order of September 22, 1893, directing a rehearing of this case.

The land involved is the SW. $\frac{1}{4}$ of section 25, T. 125 N., R. 65 W., Aberdeen land district, South Dakota.

On April 9, 1889, Boetler made homestead entry, No. 7687, of said land.

On March 12, 1892, Julia A. Dempsey filed her affidavit of contest against said entry alleging—

That said Wilhelm Boetler has wholly abandoned said tract, and changed his residence therefrom for more than six months since making said entry, and next prior to the date herein, and that said failures still exist; and that said tract is not settled upon and cultivated by said party as required by law.

Notice of a hearing ordered for June 18, 1892, was served on Boetler in person on May 14, 1892 at the city of Grand Forks, North Dakota, distant about 175 miles from the tract in contest.

The hearing was had; and on July 28, 1892 the local officers recommended that the contest be dismissed.

On August 31, 1892, Miss Dempsey filed her appeal, notice of which had been served on August 30, by registered letter addressed to L. C. Dennis Esq., attorney for Boetler, at Aberdeen, S. D., and received by him next day.

On February 8, 1893, your office reversed the decision of the local officers, and held Boetler's entry for cancellation. Notice of said decision was served upon L. C. Dennis Esq. (who was Boetler's attorney of record), by registered letter mailed February 16, and received by Dennis February 23, 1893.

On May 6, 1893, the register reported service as aforesaid, and that no appeal had been filed. Whereupon your office on May 20, 1893, closed the case and cancelled Boetler's entry.

In the meantime Miss Dempsey married. Being thus unable to make entry she relinquished her preference right. And on May 29, 1893, Michael E. Croal (her husband's brother), made homestead entry, No. 9200, of said tract of land.

On July 25, 1893, Boetler, by G. N. Williamson Esq., his attorney, filed a motion for a rehearing of the contest of *Dempsey v. Boetler* upon the following grounds, to wit:

That the said claimant (Boetler) has, since the trial of said cause, discovered new evidence which could not have been, with reasonable diligence, discovered prior to said hearing; in this—

First, that Daniel Kight, the principal witness for the contestant swore falsely on the trial of said cause.

Second, that there was a conspiracy between said Kight and the said contestant Julia Dempsey, to defraud this claimant of said tract of land, and procure the same for the benefit of said Kight.

In support of said motion Boetler filed the affidavits of himself, of Edgar Clemens, and of Joseph Peck, and a long type-written argument by his attorney, Mr. Williamson. And he served copies of all said papers on Julia A. Dempsey, and on Michael E. Croal, the new entryman. In opposition to said motion there were filed the affidavits of Julia A. Croal, Michael E. Croal, and J. H. Hauser, and two type-written arguments by counsel.

On September 22, 1893, your office allowed said motion, and directed the local officers "to order a new hearing within a reasonable time, of which you will give Mrs. Croal, Michael E. Croal and Wilhelm Boetler due notice." Your office returned the affidavit of contest and the testimony taken at the hearing, and directed that "the testimony may be resubmitted, with any other that may be offered, if the parties so desire."

A hearing was ordered for November 23, 1893, and was continued by consent until November 27th; on which day all three of the parties appeared in person with their attorneys. Upon the application of J. H. Hauser, Esq., to appear as attorney for Michael E. Croal, the register and receiver ruled—

That Michael E. Croal will not be considered as a party to this case for the reason that he is a stranger to the record; the case being between Julia A. Croal as plaintiff and Wilhelm Boetler as defendant.

Michael E. Croal excepted to this ruling.

Julia A. Croal then offered in evidence the record of the testimony taken at the former hearing on the part of the contestant; which included the testimony of Daniel Kight, Ira Kight and Julia A. Dempsey. The claimant objected to said testimony on the ground that it was incompetent. The receiver declined to rule at that time on the admissibility of the testimony offered; and the contestant rested her case.

Thereupon the claimant moved—

The Honorable Register and Receiver to *dismiss the contest* herein, for the reason that there is not evidence on the part of the contestant; for the reason that the said contestant had wholly failed to offer any evidence whatever to prove any default on the part of the claimant; and for the reason that there is no evidence to support the allegations of the affidavit of contest.

The local officers jointly “granted the motion and dismissed the case.”

Julia A. Croal and Michael E. Croal appealed to your office.

On February 2, 1894, your office reversed the decision of the local officers, vacated the order directing a rehearing made by your office on September 22, 1893, and dismissed Boetler’s motion for a rehearing.

Boetler has appealed to this Department.

In an action at law, when a new trial is granted, all the testimony must necessarily be reproduced, because there is a new jury. In courts of equity, and in certain cases in other courts in which the testimony is reduced to writing to be read by the judges, the granting of a rehearing on the ground of newly discovered evidence, does not supersede the evidence already in the record. In the case of *Finan v. Meeker* (11 L. D., 319), a rehearing was granted “on the ground of defective notice”, in consequence of which the defendant did not appear and the first testimony was taken *ex parte*; and it was held that “When an application for a rehearing is made as in this case, and the same is granted, the case will generally be tried *de novo*.” In all cases the mode of proceeding may be prescribed by the officer granting the rehearing. (See *Griffin v. Forsyth*, 6 L. D., 792.) Congress has conferred upon the Commissioner abundant authority and large discretion in this matter. Your office instructions to the local officers were right, and they erred in disregarding them. The record of the testimony taken at the former hearing in behalf of the plaintiff was admissible. Boetler then had opportunity to introduce his newly discovered evidence. He refused to do so, and instead he invoked judgment upon the testimony of the plain-

tiff as it stood, relying upon a purely technical defence. He must abide by his election. (See *Dixon v. Sutherland*, 7 L. D., 312.) Upon the evidence introduced at the hearing, the decision of the local officers must be reversed, and the cancellation of Boetler's entry must be reaffirmed.

I have examined the motion for a rehearing and the affidavits filed for and against the same in connection with the testimony taken at the first hearing. The showing was insufficient to justify a rehearing. Your office erred in allowing it. And your office order to that effect was properly vacated.

I have also carefully examined the whole record, the testimony and the arguments of counsel, and find that the evidence sustains your office decisions of February 8, and May 20, 1893, cancelling Boetler's entry.

Your office decision is hereby affirmed. The contest is sustained. Boetler's entry is canceled. And Michael E. Croal's entry is held intact.

RESERVATION—EXECUTIVE ORDER—ENTRY.

CALIFORNIA LOAN AND TRUST CO.

The failure of the local office, in noting an executive order of reservation, to include a tract of land actually embraced in said order, will not defeat the reservation as to said tract, and a homestead entry, subsequently allowed therefor, must accordingly be canceled.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (I. D.)

The California Loan and Trust Company appeals from your office decision of December 8, 1893, refusing to re-instate Stewart's canceled pre-emption cash entry for the NE. $\frac{1}{4}$ of Sec. 32, T. 4 S., R. 1 E., Los Angeles land district, California.

June 19, 1883, an executive order was made reserving from entry the N. $\frac{1}{2}$ of Sec. 32, the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lots 1 and 2 in said section, T. 4 S., R. 1 E., S. B. M., together with other described lands, for the benefit of the Mission Indians, with the proviso that such withdrawal should not affect any existing valid rights.

A copy of that order was transmitted by your office to the local office, which, by mistake, described the land in said section 32, so withdrawn, as the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lots 1 and 2 therein, thus omitting the entire N. $\frac{1}{2}$ of the section, and the local office entered the lands withdrawn as they were described in your letter of transmittal.

Wm. B. Stewart filed his pre-emption declaratory statement on May 3, 1888, for the NE. $\frac{1}{4}$ of Sec. 32, alleging settlement May 1, 1888, and on January 12, 1889, made proper final proof and payment and received his certificate.

July 28, 1889, Stewart executed a mortgage on this land to the California Loan and Trust Company to secure a loan of \$1,000, which mortgage was filed for record the same day.

September 7, 1889, your office held said entry for cancellation because the land was covered by said executive order, and March 31, 1890, Stewart having had due notice of your office action and not having appealed therefrom, the entry was canceled.

December 29, 1891, a second executive order was issued embracing the lands named in the former order of 1883, together with other lands. This order was transmitted with the correct description to the local office with letter of August 6, 1892, which last order also says that the withdrawal "shall not affect any existing valid rights of any party."

November 27, 1893, the Loan and Trust Company made an application to have the entry re-instated on the ground that the order of withdrawal never became effective as to tract in question because of the mistake in the description in the letter of transmittal and the consequent error on the books of the local office.

In *Neal v. McMullin* (16 L. D., 296), it was held that:

An order of the General Land Office directing the location of a military bounty land warrant, upon a specific tract of land operates to segregate said tract from the public domain and precludes the subsequent acquisition of settlement rights thereon, notwithstanding the fact that the local office failed to enter said order of record as directed.

And in *Johnson v. Clarke* (16 L. D., 69), it was held that:

An entry will not be allowed to embrace a tract actually sold by the government to another, in accordance with the claim of such purchaser but not described in the patent subsequently issued to him.

And in *Henry Milne* (14 L. D., 242) that:

The segregation of land effected by a timber culture entry is not defeated by the failure of the local officers to note such entry of record and a private entry of land thus reserved can not be properly allowed.

The decision last quoted recites and approves the case of *John C. Irwin* (6 L. D., 585):

Land reserved by competent authority is not subject to appropriation under the public land laws during the existence of such reservation. That the records in the local office did not disclose the existence of the reservation and in consequence of such fact the land was entered and great expense incurred will not legalize such an entry or authorize the issuance of patent thereon.

And in *Wm. T. Tucker et al.* (13 L. D., 628) it was held that:

An executive order setting apart and establishing a reservation has the effect of law and is binding upon all departments of the government and upon every citizen of the United States, and the executive will, in such matter, can not be defeated through a failure of the surveyor to properly locate the boundaries of the survey.

In view of these repeated adjudications, some of them involving as great hardship as the case here presented, it must be held that the executive order of 1883, lawfully effected the withdrawal of the tract in controversy from entry or settlement. It does not appear from the

record before this Department that the executive order of 1891, in any way affected the order of 1883.

Your office decision is affirmed and the motion to re-instate said entry is denied.

REPAYMENT—GOOD FAITH OF ENTRYMAN.

WILLIAM WAIBLE.

Repayment may be granted where the final proof is held insufficient and the entry canceled, if it appears that the entryman acted in good faith, and made no effort to deceive the officers of the government as to his compliance with law.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (A. E.)

This is an appeal from your office letter of February 7, 1894, directed to F. M. Heaton, Esq., attorney for Waible, denying the application of said Waible for repayment of money paid for the NW. $\frac{1}{4}$ of Sec. 4, T. 114 N., R. 80 W., Huron, South Dakota.

Waible made homestead entry of this land June 9, 1883, and commutation proof November 15, 1884. The proof made by Waible not being deemed satisfactory, he was called upon by your office for more definite evidence as to residence. In response to this, Waible filed a long affidavit, corroborated by two witnesses, giving detailed account of his action in and about his entry.

Your office, on October 27, 1885, considered this affidavit as conclusive of Waible's bad faith, because he states that he was absent from his claim working at his trade a period in the aggregate of eleven months.

The general character of the statements in the final proof papers appears owing to the neglect of the local office and not to claimaint, and the particular detailed account of his presence on and away from the land, given by Waible when called upon for more definite proof, shows that he had no desire to deceive the officers of the government. In view, therefore, of the fact that he held the land from June 9, 1883, until November 15, 1884, a period of seventeen months, and therefore actually lived upon it six months, raised a good crop, and made improvements valued at \$218.00, it can hardly be concluded that he acted in bad faith, particularly as he was poor, a single man, and there was severe drought in his neighborhood. Waible's good character and good faith are testified to by several persons, and the very affidavit upon which the cancellation was based indicates a frankness and simplicity that is strongly in his favor. Had Waible been acting in bad faith, he would not have given such minute account of his absences, and his so doing should not be taken against him, but rather in his favor, as he was frankly giving what the local office had not before required him to give.

Therefore to refuse repayment would be a hardship that the law does not impose, and you will allow the repayment.

PRACTICE—RIGHT OF APPEAL FROM THE GENERAL LAND OFFICE.

KEARNS v. BALDWIN.

In the absence of an appeal taken in time from a decision of the local office, or valid excuse for such default, there is no right of appeal to the Department if said decision is affirmed by the Commissioner of the General Land Office.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (F. W. C.)

I have considered the appeal by James K. Kearns from your office decision of October 19, 1893, rejecting his timber culture application covering the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 15, T. 2 N., R. 69 W., Denver land district, Colorado, and awarding to Edw. D. Baldwin the right to purchase the same under the provisions of Sec. 5, of the act of March 3, 1887 (24 Stat., 556).

This land is within the limits of the grant for the Union Pacific railroad company, but by departmental decision of February 18, 1892, was held to have been excepted therefrom.

On May 24, 1886, Kearns tendered a timber culture application for this land which was rejected for conflict with the grant, and May 20, 1890, Baldwin applied to make homestead entry for the land which was also refused for conflict with the grant. From such rejection both parties appealed and upon the rendition of departmental decision of February 18, 1892, holding the land to be excepted from the company's grant, your office letter of March 22, 1892, addressed to the local officers, directed that a hearing be ordered in order to determine the respective rights of Kearns and Baldwin in the premises.

From the testimony adduced it appears that this land has been in the possession of the Baldwins since about 1877. It was first improved by the father of the present claimant who fenced construction ditches thereon, cultivated and improved the same until his decease, after which time his wife, the mother of the present claimant, had possession of the land and on February 2, 1886, contracted with the railroad company to purchase the land.

After making one payment she died and the heirs made several payments thereafter. The wife of the present claimant had certain claims against the estate and it appears that an agreement was entered into between the parties claiming under the estate, in which the heirs surrendered their claims in favor of the wife of the present claimant, and a new contract was entered into with the company in order to avoid complications arising in the settlement of the claimant's mother's estate, the new contract being in the name of Edw. D. Baldwin and H. W. Huson. This latter contract was not entered into until 1891. It appears that Huson was made a party to this contract for the reason that Baldwin was unable to raise the money to make the remaining payments to the company, but that afterward Baldwin repaid Huson and the latter assigned his interest to him.

Upon the record as made before the local officers, they decided in favor of the claimed right of purchase and recommended that Kearns' timber culture application be rejected.

Notice of this decision appears to have been served personally on Kearns' attorney on October 15, 1892, and the appeal taken therefrom was not filed in the local office until November 16, 1892. A motion was filed on behalf of Baldwin to dismiss said appeal for the reason that the same was filed out of time and that appellant had no interest or claim to the land for the reason that prior to the presentation of his timber culture application in 1886, to wit, on November 19, 1885, one Frank W. Calkins tendered a timber culture application for the SE. $\frac{1}{4}$ of this section, which was allowed by Commissioner's letter "F" of September 21, 1888, the same going of record under date of October 3, 1888, which entry is still of record.

In answer to the motion to dismiss Kearns' attorney alleges that in the record kept of decisions in his office, notation was made thereon that notice was given by registered mail and that due to such erroneous notation he was misled in filing the appeal, believing that the time would be governed under the rule where notice is given by mail.

Your office decision waived objection to the appeal, considered the case upon the merits and sustained the decision of the local office, from which decision Kearns has appealed to this Department.

From a careful review of the matter I can see no reason to disturb your office decision upon the merits, and as it clearly appears that the appeal from the local officer's decision was filed out of time and the excuse offered by his attorney for not filing the same in time not being such as to make an exception to the rule, I am of the opinion that as your office decision affirmed that of the local office, the same thereupon became final and that a further right of appeal did not lie.

Kearns' application will therefore stand rejected.

PATENT—ERRONEOUS DESCRIPTION OF LAND.

HANS P. HANSON.

Where a patent is issued that includes land not embraced in the patentee's entry, a new patent may issue with the correct description of the land, on the surrender of the former patent, accompanied by proper evidence that the patentee has not sold or incumbered the land erroneously included therein.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (I. D.)

Mr. Hanson appeals from your decision in office letter "C", of January 20, 1894, wherein you refuse to correct a patent issued to him for lots 9, 10, 15 and 16, and the NE. $\frac{1}{4}$ of Sec. 6, T. 112, R. 73, Huron land district, South Dakota.

Hanson made homestead entry for lots 9, 10, 15 and 16, of the NE. $\frac{1}{4}$ of Sec. 6, aforesaid, and in due time published notice that he would make final proof for said land. On January 26, 1884, having made final proof and full payment for the land he received his final certificate.

It appears that the NE. $\frac{1}{4}$ of said section is a fractional section containing over three hundred acres and divided into lots 1, 2, 7, 8, 9, 10, 15 and 16. The land entered by Hanson was correctly described in his application, his publication, his final proof, his receipt and certificate, as lots 9, 10, 15 and 16 of the NE. $\frac{1}{4}$, but by clerical error your office issued his patent for lots 9, 10, 15 and 16 and the NE. $\frac{1}{4}$ of said section.

Hanson returns the patent to your office asking that another patent be issued to him in accordance with the facts. Your office thereupon, by the letter appealed from, required him to furnish the certificate of the recorder of deeds of the county in which the land is situate, that Hanson had not alienated or incumbered any of said land, and also that he execute to the United States a quit-claim deed for the NE. $\frac{1}{4}$ of said section.

From your decision making such requirement he appeals.

The case of Frank Sullivan (14 L. D., 389) holds that the Commissioner may cancel a patent that fails to describe the land entered, and issue one that correctly describes the land, and that it is not necessary that the patentee should file a relinquishment in order to invest your office with jurisdiction to cancel the erroneous patent and to issue patent correctly describing the land. In the case here presented Hanson asks either the issuance of a correct patent in lieu of the one he returned to your office, or the delivery to him of the original patent.

It is clear that your office has no authority to deliver to him the erroneous patent now with the papers in this case, but Hanson having in all respects complied with the law, is entitled to a patent for his land. The mistake in the description gave him no title to lots 1, 2, 7 and 8 of said NE. $\frac{1}{4}$ and no reconveyance is necessary.

The patent shows no marks of its ever having been recorded, but as he retained possession of it for over three years before he returned it, he will be required to file in your office a certificate of the recorder of deeds of said county, showing that Hanson has not alienated or incumbered in any way any of said NE. $\frac{1}{4}$ outside of his own lots 9, 10, 15 and 16, and upon his filing such certificate a patent will issue to him for said lots. The requirements of your letter are modified accordingly.

EXTENSION OF TIME FOR PAYMENT—GOOD FAITH.

WILLIAM C. BROWN.

An extension of time for payment may be granted on a showing of failure of crops for which the entryman is not responsible.

On a showing to procure such extension the good faith of the applicant is not impugned by the fact of his having cultivated land other than his own in order to secure means for the purchase of his claim.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (J. I. P.)

By your office letter "G" of February 28, 1894, you transmitted to this Department the appeal of William C. Brown from your office decision of October 31, 1893, denying his application for extension of time within which to make payment for the SE. $\frac{1}{4}$ of Sec. 4, T. 21 N., R. 48 W., Alliance, Nebraska, land district, which tract is embraced in his declaratory statement No. 25, filed August 1, 1890, alleging settlement thereon July 1, same year.

Brown made final proof on his pre-emption claim August 22, 1893, and at the same time filed his application for an extension of time in which to make payment, supported by his affidavit, corroborated by the affidavits of two other persons. His application is based on the joint resolution of September 30, 1890 (26 Stat., 684), which provides—that whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of the failure of crops, for which he is in no wise responsible, is unable to make the payment on the pre-emption or homestead claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

Brown, in his application, states that he came to the place in April, 1890, with seventy-five dollars in money; put thirty acres in crop on another tract already broken; moved upon his premises in May, and put five acres in crop there, both of which were total failures, on account of hail and drouth. The following year he had not the means to farm any more than he had broken formerly on his place, ten acres, the yield from which was five bushels to the acre. In 1892 he farmed seventeen acres, which, owing to hail and drouth, was again a failure; that he tried stock on his land, and is of the opinion that as a stock farm it will be a success, and for that reason desires to remain in possession of it; that his effort to maintain himself free from debt and procure stock, together with the failure of crops, has prevented him from obtaining sufficient money to make the payment; and he asks for an extension of the time, as provided in the joint resolution of September 30, 1890, *supra*.

The local officers recommended the allowance of the application. Your office, in the decision appealed from, denied his application, on

the ground that cultivation upon lands other than those embraced in his claim should not be considered in connection with his application, and that his cultivation of only five acres in 1890 was too small an area in cultivation upon which to base his claim for extension.

From all the facts in the case it is evident to my mind that Brown has made a showing that evidences his good faith, and the cultivation of land other than his own, already broken, was but the use of means ready at hand to obtain money with which to assist in paying for his claim. There is no claim that he has not complied with the law, or that if his crops had not failed he would not have been able to pay for this tract; and in view of the fact that the joint resolution under which he makes his application is remedial purely, and should be liberally construed, I think his application should be granted. At any rate, his failures of crop were caused by reasons for which he was in no wise responsible, and that ground, under the joint resolution referred to, is sufficient to entitle him to the extension. The case of *Thomas P. Finley* (20 L. D., 11), is strongly supportive of this opinion.

The decision of your office is reversed.

REPAYMENT—MINING CLAIM—FOREIGN CORPORATION.

MARY MCM. LATHAM.

Repayment will not be allowed on a canceled mineral entry that was secured through fraudulently suppressing the fact that said entry was for the benefit of a foreign corporation.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (G. C. R.)

On October 22, 1875, Milton S. Latham made mineral application No. 239 for the Buchanan copper mine, Lot 37, Sec. 34, T. 8 S., R. 18 E., M. D. M., Stockton, California, and on March 14, 1876, he made mineral entry No. 123.

The Department, on November 10, 1890 (11 L. D., 425), affirmed the decision of your office, holding the entry for cancellation.

It appeared from the evidence that Latham was a citizen of the United States, and president of the London and San Francisco Bank (limited), a foreign corporation; that one Atwood had held a mere possessory title to the mine and on May 4, 1869, and September 1, 1870, executed mortgages on the mine to Latham, individually, amounting to \$17,650.51. These mortgages, while given to secure notes made payable to Latham individually, were in fact made for the benefit of the bank; that Latham foreclosed the mortgages, obtained judgment and under the proceedings the mine was sold for the debt, and Latham bought it at the sheriff's sale, the purchase being made for the benefit of the bank, in pursuance of his trust. Thereafter (as above seen), he made mineral entry for the land, March 14, 1876, and being about to

retire from the bank, he transferred the mine by deed to Arthur Scrivener, as trustee for said bank, on November 30, 1877, no consideration passing to him therefor. The expenses of the application, entry, and other expenses, were paid by the bank.

On these facts, the entry was held for cancellation, because the same was made in the interest of a foreign corporation and for its benefit.

Your office decision of April 7, 1894, denied the application of Mary McM. Latham, heir of Milton S. Latham, for a return of the purchase money paid on said mineral entry. An appeal from that judgment brings the case here.

Section 2362 of the Revised Statutes provides for repayment to the purchaser or his legal representatives or assigns, upon proof "that any tract of land has been erroneously sold by the United States so that from any cause the sale can not be confirmed."

An entry is not erroneously allowed, within the meaning of that statute, if obtained by false testimony. (Edmund F. Morcom, 9 L. D., 103.)

The entryman knew the entry was not made for his benefit, but for the benefit of a foreign corporation; he, therefore, knew, or should have known, that the entry for that reason was illegal. He made the application and entry as if for his own benefit, and suppressed the information that it was made for a foreign corporation. Had he set forth the real facts that he was only a trustee, and the foreign corporation was the *cestui que trust*, the entry would not have been allowed.

The entry was, therefore, a fraudulent one; for he who suppresses information which would defeat an entry commits a fraud as great and far reaching as if he were to make an affirmative fraudulent statement, upon which an entry is allowed. In either case the entry should be canceled for fraud, and, when so canceled, payment of the purchase money will not be made.

The decision appealed from is affirmed.

PRACTICE—NOTICE BY PUBLICATION—TRANSFeree.

CHARLES C. McIVER EX PARTE,

and

NEVVIEW v. ROCK ET AL.

As a pre-requisite to service by publication it must be made to appear that personal service can not be obtained, and such showing must include attempted personal service on a transferee where his interest is known, and he is a party to the suit; and in the absence of any such showing as to said party, an order for publication is not authorized.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (A. E.)

The records in the above two cases were consolidated and considered together by your office, although the applications for re-instatement should have been considered and disposed of first.

The land involved is the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 33, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 28, Tp. 59 N., R. 15 W., 4th P. M., Duluth land district, Minnesota.

The record is as follows:

On April 12, 1881, Joseph Roeinski filed declaratory statement for the land, alleging settlement April 6, 1881. On November 10, 1881, Roeinski made pre-emption proof, paid for the land, and received certificate.

On October 23, 1888, an affidavit of contest was filed against the entry in the local office by Ellen Hafto, which was supplemented by another affidavit on May 8, 1889.

A hearing was held on February 25, 1890, after which, and on November 3, 1890, the entry was canceled. Nine days after the cancellation, one William Rock made homestead entry of the land, and on October 24, 1891, made final commutation proof.

On January 13, 1892, Joseph Nevview filed an affidavit of contest against the entry of Rock, charging that the entry had not been made in good faith, but fraudulently for the benefit of another.

After a hearing, and on February 17, 1893, the local office found in favor of contestant, and recommended the cancellation of Rock's entry.

Meantime, a petition, dated June 15, 1892, was filed in the local office by one C. C. McIver, administrator of Henry Stephens, deceased transferee, asking for the reinstatement of the entry of Roeinski. This petition stated that on July 20, 1883, Henry Stephens, for a valuable consideration and in good faith, purchased the land in controversy through mesne conveyance from said Roeinski; that said Stephens died February 4, 1886, in California, and that McIver was appointed sole administrator; that the estate of Stephens had no notice of the contest proceedings brought to annul the entry of Roeinski, nor of the cancellation of said entry. This petition was forwarded to your office, and considered in connection with the appeal of Rock, in the contest case of Nevview *v.* Rock, involving the same land.

By your office decision of November 25, 1893, the petition of McIver was denied, while the entry of Rock was held intact. From this decision both McIver and Nevview appealed to this Department.

The first matter to be disposed of is the petition of McIver, administrator of Henry Stephens. To do this it is necessary to consider the action upon which the local office took jurisdiction of Roeinski and Stephens, transferee.

The contest affidavit against the entry of Roeinski was filed in the local office on October 23, 1888, a supplemental affidavit being filed on May 8, 1889.

On December 16, 1889, a notice was issued, addressed to Joseph Roeinski and Henry Stephens, transferee, which ordered a hearing February 25, 1890.

On December 17, 1889, N. B. Thayer, attorney for contestant, made the following affidavit:

U. S. LAND OFFICE,
Duluth, Minn.

ELLEN HAFTO v. JOSEPH ROSINSKI.

N. B. Thayer being duly sworn deposes and says I am att'y for contestant in said case. I have made due and diligent search for said defendant by inquiring at the post office and of explorers and woodmen from this part of the country where the land lies and also from the deputy sheriff at Cloquet the point nearest the land, but am unable to learn anything of his whereabouts and believe he is not a resident of this State and that personal service can not be had. Wherefore, I pray that an order issue to publish the notice in said case.

N. B. THAYER.

Subscribed and sworn to before me this 17th day of December A. D. 1889.

W. COLVILL, *Register*.

On the bottom of this affidavit is endorsed, without date, the following:

ORDER.

On reading and filing the foregoing affidavit, the same having been found satisfactory, it is hereby ordered that notice in said case be given by publication the required length of time in the Duluth Daily Tribune, due proof thereof to be made and filed.

W. COLVILL, *Register*.

On December 18, 1889, the following notice was begun in the Duluth Daily Tribune newspaper:

LAND OFFICE NOTICE.

IN UNITED STATES LAND OFFICE,
At Duluth, Minn., Dec. 16, 1889.

ELLEN HAFTO, CONTESTANT, v. JOSEPH ROSINSKI, CONTESTEE, AND HENRY STEPHENS, TRANSFEREE.

Involving title to C. E. No. 2933, dated Nov. 10th, 1881, ne $\frac{1}{4}$ of nw $\frac{1}{4}$, n $\frac{1}{2}$ of ne $\frac{1}{4}$, 33, se $\frac{1}{4}$ of se $\frac{1}{4}$, 28, Tp. 59, R. 15 w.

Upon the complaint of the contestant, alleging that the land above described was wrongfully, fraudulently and unlawfully entered by the Contestee, and upon application made by Contestant to contest the entry aforesaid, a hearing has been ordered by the Honorable Commissioner of the general land office in his letter "H" May 25th, 1889, to determine the truth of the matters charged in the complaint and application aforesaid, and of the right of contestee or those claiming under him, to the said land.

It is therefore hereby ordered that the 25th day of February, 1890, be set apart as a day of hearing the above cause, and all parties in interest are summoned to appear at this office at 10 o'clock a. m., of said day, to respond and give testimony on the question raised.

N. B. THAYER,
Attorney for Contestant

C. P. MAGINNIS, *Receiver*.

On December 19, N. B. Thayer, attorney as aforesaid, filed an affidavit in words following:

N. B. Thayer being duly sworn says: On the 17 day of December 1889 I mailed to the address of Joseph Rosinski and also to the address of Henry Stephens each a letter envelope containing a letter copy of the notice of contest in said above case, as per receipt hereto attached.

The letter to Roeinski was addressed to Cloquet, Minnesota, and was returned unopened. The return registry card from the letter sent to Henry Stephens was signed "Henry Stephens."

On February 25, 1890, Frank M. Thomas made affidavit that he had on January 2, 1890, posted a true copy of the notice of contest on a tree on the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 33, "being one of the subdivisions of land involved in this contest."

In the case of *Parker v. Castle*, on review (4 L. D., 84), in passing upon a question of notice by publication, Secretary Lamar said:

It is a principle as old as the common law itself, that where personal or property rights are involved in a judicial inquiry, jurisdiction can not be acquired until due notice thereof, by personal service, is given to the party or parties interested.

In the progress of events exception has been made to this general rule where property rights are involved. But the exception exists only by virtue of statutory enactment, and being in derogation of the common law right of personal service, it is universally held that it must be shown affirmatively that the statutory requirements have all been complied with, as a condition precedent to the acquiring of jurisdiction through the substituted service. The Land Department in its practice has recognized this exception, which allows service other than personal.

Rules of Practice require that notice by publication can only be given when it is shown by affidavit of contestant, and by such other evidence as the register and receiver may require, that due diligence has been used, and that personal service can not be made. The party will be required to state what effort has been made to get personal service. The notice must be given by advertising the notice at least once a week, for four successive weeks, in some newspaper published in the county wherein the land in contest lies; and if no newspaper be published in such county, then in the newspaper published in the county nearest to such land. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

When notice is given by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified thirty days before date of hearing, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place on the land, for at least two weeks prior to the day set for hearing.

Every act mentioned above is essential, and the neglect to perform any one of them is a defect which prevents the acquiring of jurisdiction. The question, therefore, which is necessary to be determined in the case under consideration is, whether the contestant Hafto and the local office performed all these acts before passing upon the case.

The first act necessary was attempt to personally serve both Roeinski and Stephens, transferee, as the interest of the latter being known and he being a party, service on him was as requisite as upon the entryman. No effort appears to have been made with reference to Stephens, nor is there any affidavit on record showing he could not be found personally, or that any effort was made to find him, nor that he was not a resident

of the State. To enquire at a post office, of a deputy sheriff and woodsmen, may or may not be "due diligence;" but even were this sufficient upon which to base an order for publication as to Roeinski, it would not be any basis for publication as to Stephens, who was a party of record and known to be a transferee.

In view of this, you will issue an order to Rock to show cause why his record entry should not be expunged, and that of Roeinski reinstated, ordering a hearing for this purpose, and notifying all parties in interest, but confining the testimony to the question raised by the order to show cause.

Your office decision of November 25, 1893, is thus modified.

PRACTICE—HEARING—MINERAL CHARACTER OF LAND.

DARGIN ET AL. *v.* KOCH.

A final decision of the Department in which a tract of land is held to be mineral in character is only conclusive up to the period covered by the inquiry, and will not preclude a subsequent investigation as to the character of said tract on allegation that the mining claims thereon have been abandoned, and that the land as a present fact is agricultural.

Secretary Smith to the Commissioner of the General Land Office, April 12, 1895. (P. J. C.)

The land involved in this appeal is the NW. $\frac{1}{4}$ of Sec. 4, T. 4 S., R. 70 W., Denver, Colorado, land district.

It appears from the record that Henry Koch made homestead entry of said land January 8, 1883, and on July 9, 1886, offered final proof, when D. G. Dargin and W. W. Gayton appeared and protested against the allowance of the same on the ground that the land was mineral in character. A hearing was had, which finally resulted in departmental decision of September 18, 1890 (L. & R. No. 206, p. 261), by which the judgment of your office and the local office was affirmed, holding the said homestead entry for cancellation for the reason that the land was more valuable for mineral than agricultural purposes. It appears that thereafter Koch applied to have said judgment modified to the extent of allowing him to enter that part of his homestead not found to be mineral in character, and also for a re-hearing. By departmental decision of November 22, 1890 (L. & R. No. 209, p. 113), this motion was denied. He then filed a motion for review of the decision of September 18, 1890, which was overruled May 23, 1891 (L. & R. No. 219, p. 488).

June 18, 1891, Koch made homestead application for the land under the act of March 2, 1889. With his application is presented his corroborated affidavit, in which he charges that the several mining claims theretofore located on the land have been abandoned, and no annual assessment work done thereon "for a period of more than 5 years;" that all the claims located were "prospects" and made to secure the

Darwin M. Koch

ground in case further developments should disclose minerals; that the ground is more valuable for agricultural than mineral purposes. He asks that a hearing be ordered "to determine the character of this land, as has been shown by all the developments and work done thereon up to this date." Dargin and Gayton filed protest against hearing and entry. On July 3, 1891, the local officers rejected Koch's application, and denied him a hearing, for the reason that the decision of September 18, 1890, had declared the land mineral in character. August 1, following, Koch filed a motion for review. On August 25, Dargin presented an application for patent for the Champion lode, located on said land. Action was suspended thereon, and on the following day they modified their former ruling, ordering a hearing, and as a result decided June 25, 1892, that as a present fact the land is more valuable for agricultural than mining purposes.

Notice of this decision was sent by registered letter addressed to both plaintiffs at Golden, Colorado. Dargin's receipt is dated June 29, returned from Golden, while Gayton's is dated July 12, and returned from Cleveland, Ohio. On July 16, 1892, Dargin filed a motion for review, which was overruled September 12, following, and both defendants acknowledged receipt of notice by registered letter September 13, 1892.

On December 3, 1892, Dargin and Gayton filed an appeal from the decision of the local office "rendered therein on June 25, 1892," and on December 7, Koch filed a motion to dismiss the same on the ground that it was not filed in time.

Your office, by letter of March 30, 1893, sustained the motion to dismiss the appeal, whereupon, on May 26, following, Dargin and Gayton filed a motion for re-consideration of said decision, on the ground (1) that the motion for review of the decision of the local officers filed by counsel on July 16, 1892, was intended as an appeal; that the attorney who filed the motion for review was not learned in the law and the practice and intended said motion as an appeal; (2) that granting the appeal was not taken in time, yet the case should be re-opened because the former decision of the Department as to the character of the land was a final adjudication of that question, and the application for the second hearing should have been denied by the local officers.

In the consideration of this motion your office, by letter of August 8, 1893, overruled the first ground, but held that—

The present case is identical with the one in which the above decision (Departmental decision of September 18, 1890) was made, both as to parties and subject matter, in view of which fact, the second ground of the motion for review is hereby sustained.

A motion for review of this decision was filed by Koch and overruled October 25, 1893, whereupon he prosecutes this appeal, assigning error, substantially, (1) in considering the motion for review filed by Dargin and Gayton on May 26, 1892, and (2) in holding that the mineral character of the tract was *res adjudicata*.

If the local office had jurisdiction to try and determine this second contest, then their judgment was conclusive on the parties unless appealed from. There can be no question as to the fact that the appeals were not filed in time, under the rules of practice. This is simply a matter of computation. Dargin received notice of the decision June 29, 1891; July 16 he made his motion for review; this was overruled September 12, and he received notice thereof September 13. Gayton received his notice July 12. He filed no motion for review. On December 3, 1892, both filed appeals from the decision of June 25, 1892. Under the rule (Rule 67, Rules of Practice) they were allowed thirty days from receipt of notice, and when sent by mail five days additional for transmission of notice and five days for return of appeal. Thus they were allowed forty days from receipt of notice in which to file their appeal. In Dargin's case seventeen days elapsed before filing his motion for review. Excluding the time consumed in that proceeding, his appeal should have been filed within twenty-three days after receipt of notice, which was September 13; October 6, was therefore the last day under the rules in which appeal could be filed. In Gayton's case the time expired October 19. Thus it will be seen that the appeal in neither case was filed in time.

I concur in the ruling of your office that "the fact that the former attorney for Dargin and Gayton did not possess the skill requisite to the conduct of the case is not a ground for motion for review." (*Cobby v. Fox*, 10 L. D., 483.)

The theory upon which the local officers granted this hearing was that it was alleged that the ground was not mineral "as a present fact." Koch's application to contest was first denied, but upon a motion for review of their decision the local officers granted it, counsel basing his motion on the ground that the hearing was demanded "to determine the character of the land; the question at issue is whether as a present existing fact the land is mineral." And the local officers in deciding the case said, "We are therefore of the opinion that as a present fact the land is not more valuable for mineral," etc.

It is the settled policy of the Department not to permit a second contest over the same land involving the same charges (*Gray v. Whitehouse*, 15 L. D., 352). But for failure to comply with the law after the first hearing, contests are entertained where the charge covers the period subsequent to the former trial (*Crane v. Howe*, 19 L. D., 499). These cases and the others cited therein apply more particularly to agricultural entries.

The same rule applies, however, to controversies involving the mineral character of the land. In *Searle Placer* (11 L. D., 441) it was decided that "a departmental decision that land is mineral in character does not preclude subsequent investigation on the part of the Department, as to the character of such land." The former adjudication in that case (7 C. L. O., 36), held the land to be mineral in character.

Within two years after that decision, on the report of a special agent "and the representations of certain citizens of Leadville," that the land was not placer, the Department ordered a hearing, with the result as above stated.

Again in the case of *Stinchfield v. Pierce* (19 L. D., 12) it was decided (syllabus)—

A final decision of the Department holding a tract to be non-mineral in character is conclusive up to the period covered by the hearing, but such decision will not preclude a further consideration as to the character of the land based on subsequent exploration and development.

In the last case, like the one at bar, the controversy was between the same parties, involving the same land. In that case, however, the first judgment was against the mineral claimant, the land having been declared to be more valuable for agricultural purposes than for mineral. But it seems to me there is no difference in principle whether the first judgment is for or against the mineral character of the land. In the case at bar, almost five years elapsed from the date of the first hearing till the application for the second. It is charged that in the meantime the mining claims in support of which the former contest was brought, have been abandoned; that parties have failed to do their annual assessment work, and that as a present fact the land is more valuable for agricultural purposes than mining. It seems to me that this is a legitimate inquiry. This does not necessarily depreciate the former judgment, which was that at that time it was more valuable for the mineral contained therein. If subsequent development demonstrates that the mineral then found has disappeared, or the mine has been worked out, or that it was worthless and unprofitable to work as a mining claim, and abandoned as such, it is not in any just sense a re-adjudication of the former issues.

I am strongly impressed with the belief that the local office had jurisdiction to order the hearing. It had jurisdiction of the parties; it therefore follows that Dargin and Gayton were obliged to bring themselves within the Rules of Practice, in order to be heard on appeal.

Your said office judgments of August 8, and October 25, 1893, are reversed, that that of March 30, 1893, dismissing the appeal of Dargin and Gayton is sustained.

PRACTICE—CONTEST—JOINT OPINION OF LOCAL OFFICERS.

KNIGHT *v.* DEAVER.

The provisions of rule 51 of Practice that require the register and receiver to render a joint report and opinion, on the termination of a contest before them, do not operate to deprive the General Land Office or the Department of authority to consider a case on its merits, where the receiver fails or declines to join in said report and opinion.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (E. W.)

The plaintiff in the above stated case appeals from your office decision of October 21, 1893, in which his application to enter is denied and his contest dismissed.

The land involved in the controversy is lot 4, Sec. 4, and lot 1, Sec. 5, T. 7 N., R. 11 E., Sacramento land district, California.

February 11, 1892, Jacob C. Deaver made homestead entry 6023 for lot 4, Sec. 4, and lot 1, Sec. 5, T. 7 N., R. 11 E., M. D. M.

March 5, 1892, Maranda W. Knight filed his affidavit of contest, alleging prior settlement on said lots, and presenting an application to enter same.

It appears that the register was absent and that the receiver had been formerly connected with the case as an attorney, but by consent of both parties the testimony was heard under the direction of the receiver.

March 21, 1893, a decision was rendered by the register, the receiver having declined to take part therein, on account of his former connection with the case.

The contest initiated by plaintiff presented the sole issue of prior settlement, upon which question of fact, the testimony being conflicting, the concurring decisions of your office and that of the local office, sustain the defendant, and the record discloses no sufficient reason for a different judgment by the Department.

The appeal, however, presents this question of law: "The decision of the register in the case at bar is void because not joined in by the receiver," and in support of this contention, plaintiff invokes the provision embodied in Rule of Practice No. 51, as follows:

Upon the termination of a contest the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.

It is not necessary to pass upon the qualifications of the receiver, who seems to have declined out of a delicate consideration of propriety, to render a decision in this case.

There is no statutory requirement which makes it obligatory upon him to render an opinion, but that duty is enjoined simply by departmental regulation. The exercise of the supervisory power therefore which is vested in the Department is not contravened by the action of the receiver in this case, whatever may be said of his qualifications in view of his peculiar relation to the same.

It is often the case that the local officers render contrary opinions, and it has never been held that in such a case the provisions of Rule 51 of practice presented any obstacle to the consideration of the matter by your office or by the Department.

I think the point is not well taken, and therefore affirm your office decision.

APPLICATION TO ENTER—APPEAL FROM REJECTION.

GALLAGHER v. JACKSON.

An application to enter land covered by the existing entry of another, confers no right upon the applicant; but an application to enter, improperly rejected at the time, protects the rights of the applicant against the claims of others, if he appeals from such rejection.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (G. B. G.)

The land involved herein is the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 18, T. 28 S., R. 25 E., Visalia land district, California.

On the November 15, 1875, Elisha Lee made soldier's additional homestead entry for the tract, which entry was cancelled October 14, 1885.

On February 6, 1886, J. B. Haggin, transferee of Lee, made cash entry of the land, under the act of June 15, 1880. This last named entry was cancelled April 6, 1889, by departmental decision of March 25, 1889, (Press Copy-book No. 175, page 370).

On January 17, 1888, the plaintiff herein, John P. Gallagher, applied to make timber culture entry for the same tract, which application was rejected by the local officers, because of the then existing entry of Haggin, and on appeal, your office, on May 29, 1888, affirmed the aforesaid action of the local officers.

Further appeal by Gallagher brought the matter before the Department, and on September 9, 1889, the Department, assuming that the land was not otherwise appropriated, modified the aforesaid decision of your office of May 29, 1888, and directed that Gallagher's timber culture application be accepted.

It appears, however, that on April 13, 1889, seven days subsequent to the cancellation of Haggin's entry, the local officers allowed Charles W. Jackson to make timber culture entry for the land, and on November 20, 1889, the Department becoming apprised of this action, modified the aforesaid decision of September 19, 1889, and directed that Jackson be required to show cause why his entry should not be cancelled, and Gallagher's application accepted.

A hearing was accordingly ordered, on the termination of which the register and receiver recommended the cancellation of Jackson's entry, and the acceptance of Gallagher's application.

Appeal was had, and on September 28, 1892, your office, by decision of that date, reversed the decision of the local officers, and held that "Gallagher's application having been made while the land was covered by the existing entry of Haggin, no rights were conferred upon him thereby, and as the appeal from its rejection did not create any new rights thereunder, said application did not become effective on the cancellation of Haggin's entry." (Maggie Laird, 13 L. D., 502), cited.

Gallagher appealed, and the case is before the Department on an assignment of errors, substantially that your office erred in its conclusions of law.

This case involves a question that has been oftener before the Department than any other one question within the range of its adjudications, and from the elaborate controversial arguments that are filed from time to time as the questions recurs in pending cases, it is clear that the position of the Department is not generally understood.

"An application to enter cannot be legally allowed for land embraced within the existing entry of another."

This is fundamental, and has been said so often by the Department, and the supreme court, that to cite case and page were idle ceremony. The reason of the rule is that an "existing entry" is a segregation of the land covered thereby. This is the underlying principle of the Maggie Laird case (*supra*), in which it is held (syllabus) that:

An application to enter land covered by the existing entry of another, confers no right upon the applicant; and if rejected, and appeal taken from such action, it is not a pending application, that will attach on the cancellation of the previous entry, as the appeal does not operate to save or create rights not secured by the application itself.

In the recent case of *Smith v. United States* (16 L. D., 352), in which a number of other cases in point are approved by citation, it was held that "a pending application to make homestead entry, protects the rights of the applicants against the subsequent claims of others," but an examination of these cases shows that the application which affords any protection against the subsequent claims of others, is a *legal* application. The holdings of the Department along this line may be summed up as follows:

An application to enter land covered by the existing entry of another, confers no right upon the applicant, but an application to enter, improperly rejected at the time, protects the rights of the applicant against the subsequent claims of others, if he appeals from the rejection of his application.

The question then, as to whether Gallagher's application was, or was not, the initiation of a right protected by his appeal, depends on the correctness of the action of the local officers, in rejecting his application.

On this point there can be no doubt. The land was segregated by Jackson's entry, and the local officers were not authorized to allow a second entry of the same land while that entry remained intact, nor had they any discretion in the matter.

Gallagher's application was properly rejected, and the decision appealed from is therefore approved and affirmed.

PRACTICE—DECISION ON REVIEW—TIMBER LAND APPLICATION.

STATE OF CALIFORNIA *v.* NICKERSON.

On denial of a motion for the review of a decision that refuses the reinstatement of an entry, the land involved is thereupon subject to entry; and an application tendered thereafter, prior to the receipt of notice at the local office of the decision on review, must be regarded as legally made.

An application to purchase timber land under the act of June 3, 1878, does not operate to segregate the land, though claims therefor, subsequently filed, must be held subject to the disposition of such application.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895.
(F. W. C.)

I have considered the appeal by the State of California from your office decision of November 25, 1893, sustaining the action of the local officers in rejecting its application to select, as school indemnity, the SE. $\frac{1}{4}$ of Sec. 24, T. 10 N., R. 1 E., Eureka land district, California.

This land was formerly embraced in the timber land entry of Chas. T. Flinn, made February 15, 1883, which entry was canceled by your office letter "P" of March 3, 1886. An application was subsequently made for the re-instatement of said entry, which was prosecuted to this Department, resulting in the decision of April 16, 1892 (14 L. D., 392), in which the application was denied and a review of said decision was refused by departmental decision of May 13, 1893.

On May 16, 1893, George H. Nickerson tendered an application for this land under the act of June 3, 1878, which was held by the local officers subject to action taken upon the motion for re-instatement of Flinn's entry, they not having been advised at that time of the decision of this Department thereon, notice of which was given them by your office letter "P" of June 10, 1893.

On June 26, 1893, the State of California presented its application to select the land in question as indemnity for losses in Sec. 36, T. 18 S., R. 32 E., which was rejected for conflict with the prior application of C. E. Pearsall to enter this tract under the homestead law, which was presented May 20, 1890, and the application by Nickerson before referred to.

Your office decision of November 25, 1893, held that upon the rendition of departmental decision of May 13, 1893, denying the motion for review in the matter of the application for re-instatement of Flinn's entry, that the tract in question then became subject to entry; that the land was not subject to entry at the time of presentation of Pearsall's application and that the same should be denied, but that it was subject to the application by Nickerson, which was sufficient cause for the rejection of the State's application to select.

The State in its appeal urges: first, that the land was not subject to the application of Nickerson, presented May 16, 1893, but that, if it

should be held that said application was valid, the rejection of its application to select was error for the reason that the same should have been held subject to Nickerson's rights under his application.

Upon the first proposition, I am of the opinion that the decision of your office was correct and that upon the rendition of the departmental decision of May 13, 1893, the land was then subject to disposition as other public land. See *Perrott v. Connick* (13 L. D., 598) and *Lough v. Ogden et al.* (17 L. D., 171).

Nickerson's application presented May 16, 1893, is therefore considered as a legal application, but such application being presented under the act of June 3, 1878 (23 Stat., 89) was not an appropriation of the land. See *Smith v. Martin* (2 L. D., 333); *Capprise v. White* (4 L. D., 176) and *Henry A. Frederick* (8 L. D., 412). In the latter case it was held that publication of notice of intention to purchase would prevent the land from being entered by another, pending the consideration of such application, but it does not appear that publication of notice of intention to purchase had been made prior to the presentation of the State's application on June 26, 1893. Said application should not, therefore, have been rejected but held subject to Nickerson's rights under his application.

Your office decision is accordingly modified and the several applications will be disposed of in accordance with the holding herein made.

CONFLICTING SETTLEMENT RIGHTS—NOTICE.

O'TOOLE v. SPICER.

The fact that land is sub-divided into forty acre tracts does not operate to confine a settlement right to the sub-division on which the settlement is actually made; but notice of a settlement right, as given by improvements, is limited to the quarter section on which such improvements are situated.

Where two claimants settle simultaneously, and place their improvements on the same forty acre sub-division, the tract may be awarded to the highest bidder of the two applicants.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895.
(C. W. P.)

I have considered the case of Lawrence J. O'Toole against William P. Spicer upon their cross appeals from the decision of your office of the 7th of November, 1893.

The land in question is the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 1 of Section 32, T. 119, R. 52, Watertown land district, South Dakota.

On the 15th of April, 1892, the day on which the land was opened to settlement, these parties made settlement on the same forty acres of the land in controversy.

Spicer made homestead entry of the above described tract on the 16th of April, 1892, at nine o'clock and thirty minutes, A. M., alleging settlement on the 15th of April, 1892, at twelve o'clock and one second P. M.

On the same day at one o'clock and fifty-three minutes, P. M., O'Toole tendered homestead application for the same land, alleging settlement on the 15th of April, 1892, at 12 o'clock, noon, standard time.

The local officers rejected O'Toole's application because of its conflict with Spicer's entry, and ordered a hearing to determine the right of the parties respectively. A hearing was had, and the local officers recommended the cancellation of Spicer's entry, and that O'Toole be allowed to make entry of the land. Spicer appealed to your office, which reversed the judgment of the local officers, holding that the parties had been equally diligent and had shown equal good faith; that—

The fact that the defendant had made his entry gives him no advantage over the plaintiff, as he had three months from his settlement in which to make application to enter the land. The most equitable settlement that could be made by the parties would be to divide the land, each party retaining his improvements. This office has no power to compel parties to compromise, and I see no more equitable way to settle this controversy, than to follow the rule laid down where parties have made simultaneous applications to enter, and order the tract to be disposed of to the highest bidder of these two applicants.

I agree with you, that the evidence is in such equipoise as justifies the conclusion that the claimants began settlement at the same time.

It is objected by O'Toole that, as the lands in the Sisseton and Wahpeton reservation are subdivided into quarter-quarter sections or forty acre tracts, the settlement of Spicer upon the same forty with O'Toole could only give him a claim by settlement and improvements to the forty on which he made settlement. But this is not so. These lands were surveyed in quarter-quarter sections or forty acre tracts, in order that allotments might be made to the Sisseton and Wahpeton Indians, under the provisions of the treaty with them. But I am of opinion that the notice of claim given by Spicer's settlement and improvements extends only to the quarter section on which they are situated and does not extend to lot 1, which is not in the same quarter section. On the other hand, O'Toole by plowing a furrow around the land claimed by him must be held to have given notice of the extent of his claim. *Cooper v. Sanford* (11 L. D., 404). O'Toole should, therefore, be allowed to enter lot 1 of Sec. 32.

If the improvements of the parties were upon different forties, it would be right to award a division upon their showing the exact legal subdivisions embraced by their improvements respectively. But the improvements appearing to be upon the same forty I see no alternative to the adoption of the rule adopted by you and ordering the tract to be disposed of to the highest bidder. With the modification that O'Toole will be allowed to make homestead entry of lot 1, of Section 32, your office decision is affirmed.

MINERAL LAND—MINING CLAIM—EXPENDITURE.

SWEENEY v. NORTHERN PACIFIC R. R. Co.

*Overruled,
25 L.R. 174*

The location of a mining claim in conformity with the law, on land returned as agricultural, raises a presumption that the land is mineral in character, and the burden of proof is thereafter with any one alleging the agricultural character of the land.

In case of an application for mineral patent that embraces several lode claims the proof should show an expenditure of \$500 on each claim, except where it is shown that the improvements on one of such claims is for the common benefit of all.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1895. (P. J. C.)

The record in this case shows that on August 12, 1893, William J. Sweeney presented his application for patent for the Waterbury, Bull's Head, Wild Bill, Naugatucket, Blue Cloud, Friday and Glucose lode mining claims, located principally in Sec. 13, T. 10 N., R. 5 W., Helena, Montana, land district.

This section is embraced in the Northern Pacific Railroad Company's list No. 13, and a hearing was ordered by the local officers to determine the character of the lands embraced in the mineral applications. Both parties appeared before the local officers by counsel, and the testimony of counsel for claimant was taken, by which it was shown that the witness had, prior thereto, had a conversation with F. M. Dudley, general attorney for said railroad company, in which it is said that the attorney for said company stated that the company recognized the lands covered by Sweeney's application as mineral and that they had been known to be such since 1865; he also testified to the fact that one Thomas Cruse had brought suit against the company to quiet the title to certain mining claims in said section, and that the company had admitted the mineral character of the land, and filed a disclaimer to the same. He also testified that he had seen a letter from Mr. Dudley to the local counsel for the railroad company, in which Mr. Dudley stated that the land was mineral land, and known to be such, and he advised that no resistance to the application be made.

There was also an affidavit presented, made by one Comer, in January, 1893, in which it is stated that the land was known to be valuable for mineral as early as 1865.

This testimony went in without objection, and the local officers decided that the mineral character of the land was established, and recommended the cancellation of the company's list No. 13 to the extent of the conflict.

The railroad company appealed, and your office, by letter of January 13, 1894, affirmed the action of the register and receiver, whereupon the company prosecutes this appeal, assigning as error, the holding of your

office that the mineral character of the land had been shown; error in consideration of the admissions made in conversation outside of the hearing, unsustained there by positive evidence; error in not holding that it was incumbent on the plaintiff to show by positive evidence that the land was valuable for mineral, having been returned as agricultural; and the allegations of the plaintiff not having been made until after the company's right had vested under its grant, and also not until after the company had duly listed said land as a part of its grant; error in giving consideration to the *ex parte* affidavit of Comer as to the character of the land.

I am disposed to think that the objection by the company to the so-called evidence offered at the trial was well taken, and that, standing alone, this testimony would not be sufficient to warrant the judgment rendered. The record shows, however, that these locations were made in conformity with the United States Statutes and the local rules and regulations of the district. This being so, it must be presumed that the land is mineral in character, for the reason that a discovery of mineral is required before a claim can be legally located, and the presumption of the Department is that all the requirements of the law were complied with in the making of said locations. (Northern Pacific Railroad Company *v.* Marshall, 17 L. D., 545; State of Washington *v.* McBride, 18 L. D., 199.) The burden of proof was therefore upon the railroad company to show that the land was not mineral in character, and it having failed to do this, the application, so far as the mineral character of the land is concerned, should have been received.

But there is an objection to this mineral application that is, in my judgment, fatal to it, as it stands. Among other requirements of section 2325, United States Revised Statutes, is one that demands that the certificate of the United States surveyor general must show that \$500 worth of labor has been expended or improvements made upon a claim by the applicant or his grantors. An examination of the report of the deputy surveyor shows that upon the Waterbury lode there is a discovery shaft four and one-half by six feet, fifteen feet deep, of the value of \$75; on the Naugatucket lode, a discovery shaft five by six feet, five feet deep, valued at \$15; on the Friday lode, a discovery shaft six by seven feet, five feet deep, valued at \$20; on the Glucose lode, a discovery shaft four and one-half by six feet, ten feet deep, valued at \$50, and an open cut five by six feet, five feet deep, valued at \$15. This is all the work or improvements shown to have been made upon these four claims, and unless it can be shown that the work done on the others was for the development or convenient working of the balance, the application should be rejected.

The work upon the other claims shows that shafts have been sunk from twenty to fifty-five feet on the same, but there is nothing to show that this work was done with a view of developing the claims first named, or that they have been used for that purpose.

Again, the total amount returned by the surveyor as the value of the improvements is but \$3,305, whereas, for the seven claims, it should be the full amount of \$3,500.

I am therefore of the opinion that unless a satisfactory showing can be made that this work or improvement to the amount required by statute had been performed, or that the work which has been done was for the common benefit of all of the claims, the application should be rejected, as to the Waterbury, Naugatucket, Friday and Glucose lodes.

The judgment of your office is therefore thus modified.

PRACTICE—APPEAL—PRE-EMPTION—PREFERENCE RIGHT.

SIELAFF *v.* RICHTER'S HEIRS ET AL.

Failure to appeal from an adverse decision of the local office defeats the right of appeal from the action of the General Land Office affirming the decision below.

A contestant who secures a preference right of entry prior to the repeal of the pre-emption law, and is at such period residing on the land with intent to pre-empt the same, has a claim thereto lawfully initiated, that is protected under the terms of said repeal.

The preferred right of a successful contestant will not be defeated by an intervening entry allowed without notice to said contestant of his right of entry.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 25, 1895. (J. L.)

I have considered the appeals of Martin Sielaff and Garrison Brock, respectively, from your office decision of March 18, 1893, affirming the rejection of their several applications for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Section 7, T. 5 S., R. 26 W., Oberlin land district, Kansas.

On April 25, 1885, one Frederick K. Richter made homestead entry No. 3116 of said land.

On August 15, 1887, Martin Sielaff filed his affidavit of contest against said entry, alleging abandonment; and at the same time he filed his pre-emption declaratory statement for said land, alleging settlement thereon.

On August 29, 1887, Moses T. Bradbury filed his affidavit of contest against said entry, subject to Sielaff's contest, also alleging abandonment.

On September 2, 1887, a motion to interplead was filed by Bradbury's attorney, which was sustained by the local officers; who thereupon, on October 10, 1887, dismissed Sielaff's contest, for the alleged reason that it was premature and illegal; and ordered a hearing of Bradbury's contest against the heirs of Richter to be had on December 23, 1887. On October 12, 1887, Sielaff appealed to your office. Pending said appeal the hearing took place as ordered. The case was heard *ex parte*, the heirs of Richter not appearing. The local officers on December 23, 1887,

recommended that Bradbury's contest be sustained, and that Richter's entry be canceled. Richter's heirs were notified of said decision by registered mail, and they took no appeal therefrom.

By letter "H" of January 27, 1888, your office sustained Sielaff's appeal; directed the local officers to order a hearing of his contest after due notice to the parties in interest; and "retained Bradbury's contest subject to the final disposition of the prior one of Sielaff."

On the day set for said hearing, April 12, 1888, Bradbury's motion to become a party in the case was overruled; the case was heard *ex parte*—Richter's heirs being still in default—and judgment was rendered for the plaintiff Sielaff. Nevertheless, on December 8, 1888, the local officers recommended that Richter's entry be canceled upon Bradbury's contest, and that Sielaff's contest be dismissed. Richter's heirs were duly notified of said decision by registered letter, but they have taken no appeal. Sielaff appealed from said decision to your office.

By letter "H" of December 12, 1890, your office affirmed the decision of the local officers so far as it recommended the cancellation of Richter's entry; but reversed it "so far as the same relates to Bradbury or the testimony by him;" and held said entry for cancellation upon the evidence introduced by Sielaff. Said decision as to the cancellation of Richter's entry became final as soon as it was signed by the Commissioner. The case was closed as to the defendants, Richter's heirs. They had no further interest in the premises. Having failed to appeal from the decisions of the local officers which adversely affected them, they could not appeal from the action of the Commissioner affirming said decisions. (See Rule of Practice 81 as amended December 8, 1885.) Richter's entry was canceled and the land was restored to the public domain by your office decision of December 12, 1890. Bradbury and Sielaff as rival contestants were the only persons interested in the case thereafter.

Bradbury appealed from said decision; and on May 13, 1892, this Department affirmed your office decision of December 12, 1890, and held "that Sielaff has a preference right of entry which he may lawfully exercise."

The preference right awarded by the Department is such as attached to Sielaff on December 12, 1890—eighty-one days before March 3, 1891, the date of the act repealing the pre-emption laws. Sielaff's settlement on the abandoned land, in 1887 and so long as Richter's entry remained intact, was not a lawful initiation of a *bona fide* pre-emption claim. But the rights of a qualified settler intending to pre-empt would attach to the land as soon as the entry was canceled. If Sielaff was a settler on the land with intention to pre-empt it, on December 12, 1890, or afterwards before March 3, 1891, his claim was lawfully initiated, and is protected by the saving clause of section 4 of the act of March 3, 1891 (26 Statutes, 1095). If such be the fact, he will be permitted to perfect his said claim upon due compliance with law, as prescribed in said section.

In respect to the appeal of Garrison Brock, notice of which was duly served on Thomas R. Kerr: It appears by the report of the register and receiver to your office, dated May 29, 1893, that a copy of departmental decision of May 18, 1892, was transmitted to the local officers with your office letter "H" of June 2, 1892, directing them to—

Notify all parties in interest of said departmental decision, and at the expiration of the time allowed for filing motion for review, make prompt report of action taken, transmitting therewith evidence of notice thereof.

Nevertheless, the local officers did not notify either Sielaff or Bradbury, who were the only parties interested in said decision. Instead of doing so, the local officers, on September 5, 1892, entered on the records of the local office the cancellation of Richter's entry, and on the next day, September 6, 1892, permitted one Thomas R. Kerr, an entire stranger to the previous proceedings, to make homestead entry No. 14,986 of the land involved in the pending contest.

It also appears that on December 1, 1891, Garrison Brock had filed an affidavit of contest against Richter's entry, subject to the rights of Sielaff and Bradbury. Afterwards, on February 1, 1892, Brock filed an application to make homestead entry of said tract, which was retained by the local officers without action thereon, until September 10, 1892, when the local officers rejected said application, "for the reason that the tract was segregated by homestead entry No. 14,986 made by Thomas R. Kerr on September 6, 1892"—only four days before. From said decision Brock appealed, and on March 18, 1893, your office affirmed it. Brock then appealed to this Department.

The local officers erred in permitting Kerr to make his entry without notice to Sielaff, and giving him opportunity to exercise the preference right awarded him. And their confessed error in failing to notify Bradbury, and give him opportunity to file a motion for review, was not cured as against Sielaff by their procuring from Bradbury's attorneys, long afterwards, a waiver of all his rights in that behalf.

Brock's application to enter must stand rejected, for conflict with the rights of Sielaff.

For reasons above stated, your office decision of March 18, 1893, is hereby reversed.

Your office will cause Thomas R. Kerr to be summoned to show cause, within thirty days after service of notice, why his homestead entry No. 14,986 shall not be canceled. If he shall fail to show sufficient cause within said thirty days, his said entry will be canceled, and Sielaff will be notified thereof, and of his right to exercise the preference right awarded him. If Kerr shall show sufficient cause, *prima facie*, why his entry should not be canceled, a hearing will be ordered, of which Sielaff shall have due notice.

CROW INDIAN LANDS—PRICE OF LAND.

ANDREW J. TORREYSON.

The price of all lands formerly embraced within the Crow Indian reservation, to which title was secured by the government under the agreement of December 8, 1890, is fixed at one dollar and fifty cents per acre.

The last proviso in section 34 of the act of March 3, 1891, respecting the disposition of certain of these lands, contemplates the confirmation of settlement claims otherwise invalid, but is not intended to excuse such settlers from the payment required of others.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 26, 1895. (W. F. M.)

On November 16, 1892, Andrew J. Torreyson made homestead entry of the NW. $\frac{1}{4}$ of section 36, township 6 S., range 20 E., within the land district of Bozeman, Montana. He claimed settlement thereon on July 7, 1885, and final certificate was issued to him on February 16, 1893.

It appears that the land embraced in this entry lies within that part of the Crow reservation which was sold to the United States by the agreement of December 8, 1890, and embodied in the act of March 3, 1891 (26 Statutes pp. 1039-43).

The papers in the matter having been transmitted to your office for final action thereon, it was held by your office letter "C" of November 25, 1893, that before patent could issue the entryman "shall pay the full sum of one dollar and fifty cents for each acre of land embraced" in the entry.

The entryman has appealed here alleging as error that

In view of the fact that the Commissioner of the General Land Office by telegram 'E' of March 7, 1889, instructed the local officers to suspend action on applications to enter lands in section 25 to 36, both inclusive, in said township, because the survey was erroneous, and thereby prevented the settlers from making homestead entry, it was error not to hold that appellant was entitled to the benefit of the provisions of the second proviso of section 34, of the act of Congress approved March 3, 1891, and it was error to hold that this entry not being based on such prior filing, can only be allowed under the first proviso, which requires the payment of \$1.50 for each acre, before patent can issue.

The act of March 3, 1891, *supra*, in its 34th section, touching the lands acquired by the agreement with the Crow Indians, provides

That each settler . . . shall, before receiving a patent for his homestead pay to the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry the sum of one dollar and fifty cents for each acre thereof one half of which shall be paid within two years, (and in the same section the further proviso occurs) that all white persons who located upon said Crow Reservation by reason of an erroneous survey of the boundary and were afterwards allowed to file upon their location in the United States Land Office, shall have thirty days in which to renew their filings, and their locations are hereby confirmed.

On March 28, 1891, the entryman executed his affidavit averring that the

location and settlement by him upon said lands was made in good faith believing that the same were subject to location, settlement and entry under the land laws of the United States; and believing that said lands were outside of the Crow Indian reservation, and that he was led to believe the said lands were not within the boundaries of said reserve by reason of an erroneous survey of the boundary of the said reserve; that he has expended in good faith large sums of money and performed large amount of labor on said lands in the erection of valuable, lasting and permanent improvements, to wit, the sum of \$2,000, and said improvements consist of house, corral, stable, well, two cellars, three miles of fencing; that he intended in good faith to file upon and obtain title to said lands under the land laws of the United States, and that he would have filed upon said lands but for the fact that he was notified by the officers of the local land office in the district in which said lands are situated that no filing could be made on said lands by reason of the same being within the said reserve as shown by a corrected survey of the boundaries of said reserve. That he has constantly resided upon said lands since his said location and settlement thereon, and now offers to file on said lands pursuant to an act of Congress of the United States entitled, etc.

It will be observed from what has been said that the reason why your office required the applicant to pay for the land embraced in his claim at the rate of one dollar and fifty cents per acre was because he had not been allowed to file upon his location prior to the passage of the act of 1891, thus by implication saying that those who had so been allowed to file would be entitled to make proof and receive patent without the payment of one dollar and fifty cents per acre.

In the judgment of the Department these lands are all to be paid for at the rate above mentioned.

The general provisions of section 34 of the act of 1891, *supra*, are that all the lands acquired under the agreement with the Crow Indians, embodied in said act, shall be paid for at the rate of one dollar and fifty cents per acre. A few white persons were allowed to file their claims prematurely, i. e., prior to the passage of the act of 1891, misled by the erroneous survey of the boundary of the reservation, and by the last proviso of the 34th section, they by renewing or re-asserting their claims could have their locations confirmed.

The words "located" and "location" as used in said proviso are evidently used in the sense of settlement, so that when the statute reads "all white persons who located upon," it is as if it had read "who settled upon," and the purpose of the confirmation is not to free or excuse from payment, but rather to give credit for and make good as against the world settlements, accompanied by record claims, as of the date when such settlement was made, even though at that date the land was not subject to settlement or entry; in other words, to validate settlements which but for the provision would seem to be invalid. For this construction there is good reason, the erroneous survey having been misleading. For the construction treating the confirmation as excusing from payment there seems to be no reason. These unconscious and

unintentional intruders gain an advantage by having their intrusion treated as a valid settlement so as to protect them against all comers, and there is no reason for giving them additional advantage by absolving them from payment for their lands.

The government paid the Indians a large sum for the lands ceded, and the purpose of requiring settlers to pay one dollar and fifty cents per acre for lands claimed by them was doubtless to reimburse the outlay.

In my opinion, this requirement had application to all the lands without exception. It follows that your office decision requiring payment in this case must be affirmed. Also that all claims for any of these ceded lands whenever made of record must be paid for at one dollar and fifty cents per acre.

INDIAN SETTLEMENT CLAIM—RAILROAD GRANT—ACT OF JUNE 22,
1874.

PALOUSE v. OREGON AND CALIFORNIA R. R. Co.

Prior to the act of March 3, 1875, there was no law authorizing settlement, or conferring the right of entry under the public land laws upon Indians, as such, who had severed their tribal relations, and where a settlement right is set up on behalf of an Indian to defeat the operation of a railroad grant at a time prior to said act, it must be made to appear that said Indian was a citizen of the United States, in that he was an "Indian taxed," or subject to be taxed, under the laws of the State, or the United States.

Where a tract of land is apparently subject to the operation of a railroad grant, but the company treat it as excepted therefrom, and select indemnity therefor, the selection may stand on condition that the company relinquish the basis as provided in the act of June 22, 1874.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 26, 1895. (J. I. P.)

The tracts in controversy in this case are lots 2, 7, 8 and 10, of Sec. 11, T. 27 S., R. 3 W., W. M., Roseburg, Oregon, land district, and are within the primary limits of the grant to the California and Oregon Railroad Company, under the act of July 25, 1866 (14 Stat., 239), and within the withdrawal under said grant made by the Secretary of the Interior April 7, 1870, being opposite the located portions of the road as indicated by the map of survey filed with said Secretary March 26, 1870.

It appears that said tracts were settled on by James Palouse, an Indian of the Klamath tribe, in the year 1853, who had then abandoned his tribal relations and adopted the habits of civilized life, and that with his family he continued to reside upon, cultivate and improve said land until the year 1880, when he died. His son, Jackson Palouse, born on said land about the year 1853, who, at his father's death was a married man with children, continued to reside upon and cultivate said tract until his death in 1886, he also having adopted the habits of civilization. After his death his widow, Nellie Palouse, and son Frank, continued to cultivate and reside upon said tract.

Said tract, at the date of James Palouse's settlement thereof, was unsurveyed land, and was first surveyed in July, and August, 1882, and the map thereof was approved October 23, 1882, and filed in the General Land Office December 6, 1882.

On February 16, 1883, Jackson Palouse made homestead entry of said tracts, alleging settlement thereof and residence thereon since the year 1853. On April 2, 1883, he made final proof and procured his final certificate. On July 25, 1891, your office, by letter "F", directed the local officers to hold a hearing for the purpose of determining the respective rights of the parties to the land. Said hearing was held on September 24, 1891, and on November 21, 1891, the local officers rendered their joint decision, recommending that the claim of the railroad company be canceled, and that the homestead entry be held intact.

The railroad company appealed to your office, which, on September 19, 1892, reversed the decision of the local officers, and held the homestead entry for cancellation.

Nellie Palouse, the widow of Jackson Palouse, has appealed to this Department.

Prior to the act of March 3, 1875 (18 Stat., 420), there was no law authorizing settlement or conferring the right of entry under the public land laws upon Indians, as such, who had severed their tribal relations. *Northern Pacific Railroad Company v. Old Charley et al.* (18 L. D., 549). Hence at the date when the rights of the railroad company to the tracts in question attached, the prior occupation of Palouse conferred no rights to the tracts embraced in his homestead entry, unless it should appear that he was a citizen of the United States by virtue of the act of April 9, 1866 (14 Stat. 27), and section 1992 of the Revised Statutes, in that he was an "Indian taxed" or subject to be taxed under the laws of Oregon or of the United States. *Elk v. Wilkins* (112 U. S., 99, 112, *et seq.*).

There are, however, some facts in this case that seem to have escaped consideration.

On August 19, 1887, the railroad company filed a list of selections of indemnity lands, in lieu of lands lost in place, and in lieu of the tracts in question, alleged to be so lost by reason of the homestead entry of Palouse, it selected certain tracts in Sec. 1, T. 27 S., R. 2 W.

On November 18, 1892, it filed an amended list of indemnity selections, in lieu of lost lands, tract for tract, and in lieu of the tracts in question it selected the NW. $\frac{1}{4}$ of Sec. 26 S., R. 2 W.

The first selection was made before the hearing was had to determine the rights of the parties hereto to said tracts. The second or amended selection was made after the decision of your office awarding the tracts to said company.

These proceedings on the part of the railroad company indicate that it had considered the claim of Palouse to the tract here involved, and deeming it to be excepted from its grant, had elected to select indem-

nity land in lieu thereof, and that the amended list filed November 18, 1892, by the railroad company was the expression of a *bona fide* desire on its part to acquire title to the indemnity tract selected in lieu of the tract here in controversy. That it can do by filing a relinquishment to the tract here involved, as provided by the act of June 22, 1874 (18 Stat., 194), provided the indemnity tract so selected is not otherwise appropriated at the date of its selection.

You are therefore directed to notify said railroad company that if it will file a relinquishment, within a period to be designated by you, of the lands here in controversy, it will be permitted to select in lieu thereof the tract designated in its said amended list, provided the same is not otherwise appropriated at the date of the selection, in which event it will be permitted to select other lands in lieu thereof.

If the said company files such relinquishment within the time to be designated by you, you will proceed to examine said homestead entry for patent. If said company fails, or refuses, to file such relinquishment within the time designated by you, you will direct the local officers to order a hearing for the purpose of ascertaining whether or not James Palouse had been taxed, or had become subject to taxation, under the laws of the State of Oregon, or of the United States prior to the time when the rights of said railroad company attached to the land here in question.

THE STATE OF CALIFORNIA.

Motion for review of departmental decision of February 16, 1895, 20 L. D., 103, denied by Secretary Smith, April 26, 1895.

CONFIRMATION—MORTGAGEE—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* COOPER ET AL.

A mortgagee is not entitled to invoke the confirmatory provisions of section 7, act of March 3, 1891, as an innocent incumbrancer, where at the date of the incumbrance the records disclose the fact that the entryman had disposed of the land covered by his claim prior to the submission of final proof and payment of the purchase price.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1895. (J. I. P.)

By your office letter "P" of November 2, 1893, you transmitted here the appeal of William J. McGillen from your office decision of April 11, 1893, holding that the pre-emption cash entry No. 59 of Thomas Cooper, made September 7, 1883, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and lots 2 and 3 of Sec. 2, T. 5 N., R. 3 W., 6 P. M., McCord, Nebraska, land district, was confirmed under section 7 of the

act of March 3, 1891 (26 Stat., 1095). Said decision was rendered on an application to review and reverse your office decision of November 30, 1892, which held said cash entry No. 59 for cancellation.

The facts in this case, briefly stated, are as follows—

On September 7, 1883, Thomas Cooper made pre-emption entry No. 59 for the tracts above described.

On January 3, 1887, said cash entry was held for cancellation, on the representation of a special agent that Cooper had conveyed said tracts to one William J. McGillen more than two months prior to final proof and entry.

April 2, 1887, said cash entry was canceled on the representation of the local office that the entryman had been duly notified and allowed the usual time to apply for a hearing, and had taken no action in the premises.

April 7, 1887, The Harlem Cattle Company, transferee, appealed from the action of April 2, *supra*, alleging that it received no notice of the action of January 3, 1887, until March 1, 1887, and on April 30, 1887, the cancellation of said entry was rescinded, and the local officers directed to order a hearing in the premises.

June 1, 1889, the local officers reported that the hearing had been ordered, but continued from time to time, to suit the convenience of the special agent, and enclosed in said report an abstract of title, showing conveyance of said tract prior to final entry by Cooper.

July 27, 1889, your office adhered to its former action, holding said entry for cancellation, on the ground that the claimant Cooper had executed a quit claim deed for the tract embraced therein two months and five days prior to final proof and cash certificate.

August 14, 1889, Cooper filed his relinquishment of said entry No. 59; also the Harlem Cattle Company's acknowledgment of notice of the action of July 27, 1889, and its waiver of right of appeal therefrom.

September 17, 1889, said cash entry was again canceled by your office, and the local office was directed to hold the land subject to the first legal applicant.

October 1, 1889, William J. McGillen made homestead entry No. 9343 of the tracts embraced in said pre-emption cash entry.

October 11, 1890, there was transmitted to your office by the local office the application of I. R. Darnell, trustee of the Kit Carter Cattle Company, asking for a hearing as to the legality of the action of September 17, 1889, cancelling said pre-emption cash entry No. 59.

November 24, 1890, a hearing was ordered as petitioned for by Darnell, and the local office was advised to take no action affecting the status of the land, as it then existed. As a result of said hearing the local officers, on January 7, 1892, recommended the reinstatement of pre-emption cash entry No. 59, and the passing of the same to patent, under section 7 of the act of March 3, 1891 (26 Stat., 1095).

November 20, 1892, your office reversed the action of the local officers, and held McGillen's homestead entry intact.

April 11, 1893, your office recalled its decision of November 20, 1892, and affirmed the decision of the local officers of January 7, 1892, holding that said pre-emption cash entry was confirmed under section 7 of the act of March 3, 1891, *supra*.

The Kit Carter Cattle Company claim as transferees of the original entryman, Cooper; that on June 24, 1886, The Harlem Cattle Company, remote grantees of Cooper, executed a deed of trust for the tracts here involved, with other tracts, to the Kit Carter Cattle Company, the consideration being \$20,000. The Kit Carter Cattle Company claim that at that time they had no knowledge whatever of any defect or irregularity in Cooper's title, and that they were innocent purchasers in good faith, and hence were clearly entitled to have said entry confirmed under section 7 of the act of March 3, 1891, *supra*.

The rights that the Kit Carter Cattle Company had in the hearing ordered for the purpose of inquiring into the legality of the cancellation of said cash entry No. 59, on September 17, 1889, was to show that said entryman had in all things complied with the law prior to said entry. (*McLeod v. Bruce et al.*, 14 L. D., 85, at 87.) It is held in the case last cited that a transferee is bound to know the status of a tract at the date of purchase, as shown by the records, and where, at such time, the records show something adverse to the title of his grantor, or that he had no title, said transferee is not entitled to invoke the confirmatory provisions of Sec. 7 of the act of 1891, *supra*. The same rule is equally binding upon a mortgagee.

The evidence shows beyond all controversy that Cooper did execute a quitclaim deed for the land embraced in said pre-emption cash entry two months and five days prior to final proof and cash certificate, and this quitclaim deed executed by him to McGillen, was on record, and was notice to all the world at the date when the Kit Carter Cattle Company took its deed of trust from the Harlem Cattle Company on June 24, 1886. (*Pettigrew et al.*, 2 L. D., 598 at 599.)

The principle of *caveat emptor* applies here. The Kit Carter Cattle Company were obliged and required to take notice of the record, and are bound by what it showed, and in the face of that record they can hardly claim to have been innocent purchasers in good faith at the date they received their deed of trust from the Harlem Cattle Company.

There is some evidence tending to show that by the quitclaim deed executed to McGillen prior to final proof and entry, Cooper only intended to convey the pasturage and water rights of the tracts therein described, and not the title thereto, but such evidence, in my judgment, if competent at all, is not sufficient to overcome the declaration in the deed, which is always the best evidence. The entryman, therefore, having conveyed said tract prior to entry, rendered said entry void and of no effect. The conveyance was on record, and was notice to the Kit Carter Cattle Company at the date when it claims its rights as an innocent purchaser attached.

I am therefore of the opinion that said entry should be canceled, and that the same does not come within the purview of, and is not confirmed by, section 7 of the act of March 3, 1891, *supra*.

Other questions were presented and considered, but those passed on herein were deemed the controlling ones.

Your office decision is therefore reversed.

DESERT LAND ENTRY—PRICE OF LAND.

KATE G. ORGAN.

The provisions of section 7, of the act of March 3, 1891, fixing the price of all desert lands at one dollar and twenty-five cents per acre, are applicable to a desert entry made prior to the passage of said act, but not perfected until thereafter.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1895. (J. L. McC.)

Kate G. Organ has appealed from the decision of your office, dated July 26, 1893, rejecting the final proof offered by her upon her desert-land entry for the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, of Sec. 22, T. 14 N., R. 66 W., Cheyenne land district, Wyoming, for the reason that "only two hundred dollars was tendered as payment for the land" (two hundred acres).

The land is within the granted limits of the Union Pacific Railroad; at the time the entry in question was made (March 12, 1890), the price of lands within railroad limits was two dollars and fifty cents per acre; and said decision held that, in accordance with the last paragraph of the circular of February 2, 1892 (embodied in the departmental decision in the case of George W. Crane, 16 L. D., 170-1), the land must be paid for at the rate of two dollars and fifty cents per acre.

It is true that the initial entry was made prior to the act of March 3, 1891 (25 Stat., 1095-6-7); but that act provided that in case of all desert-land entries in existence at that date, "upon payment to the receiver of the additional sum of one dollar per acre of said land a patent shall issue therefor to the applicant or his assigns." In the case at bar, final proof was made on June 22, 1893—subsequently to the passage of the act above cited; hence it is subject to the provisions of said act. (See case of Robert J. Gardinier, 19 L. D., 83.)

The decision of your office, in so far as it demands more than one dollar and a quarter per acre as the total amount to be paid for said land, is reversed.

ISOLATED TRACT—HOMESTEAD ENTRY.

JOHN M. NETTLES.

An order directing the sale of an island as an isolated tract, after the survey thereof, excludes the land from appropriation under the homestead law by the applicant obtaining said order, or any other person.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1895. (W. M. B.)

This is a motion filed by John M. Nettles for review of departmental decision rendered January 5, 1895, in the case of John M. Nettles, wherein was affirmed the concurring decisions of the local office and your office in rejecting the application of Nettles to make homestead entry for lot 3, Sec. 3, T. 37 S., R. 41 E., Gainesville, Florida, land district.

Said departmental decision is complained of on the ground that it is—

1. Against the homestead law, under which application to enter has been made January 16, 1893.

2. It is against the rules of equity.

3. And against the liberal policy applied by the Department of the Interior, applied always to *bona fide* settlers upon the public domain.

The foregoing assignments of error are supported by a somewhat lengthy argument, which is a departure from the requirements of amended rule 114 of Practice (18 L. D., 472), in words as follows—“Each motion must state concisely and specifically, without argument, the ground upon which it is based.”

It will be observed, moreover, that the above specifications contain no allegations of reversible error.

Furthermore, there is no merit in the motion as based upon the argument submitted, which sets forth in a general way a more material allegation of reversible error than is contained in either of the specifications, in this: that the land in question, under existing law affecting the public domain, can be entered and appropriated only by actual settlers and that there is no law under which the same can be disposed of at public sale.

The records of the land office fail to show any land as Lot 3 in Sec. 3, township and range mentioned, and the land sought to be entered by Nettles is an island in said Sec. 3, containing 61.70 acres, which was, on May 8, 1890, ordered by this Department to be surveyed upon approving the application of Nettles to have the island offered at public sale as an isolated tract under Sec. 2455, Revised Statutes, and Sec. 9, p. 943, 2d. Ed., Supl., Revised Statutes.

In the case of *ex parte* Luther K. Madison (12 L. D., 397) it is held (syllabus) that—“an order directing the sale of an island as an isolated tract, after the survey thereof, excludes such land from subsequent settlement or filing.”

Under provision of sections above named of the Revised Statutes and supplement thereto, and ruling in the above cited case, the land in question cannot be made subject to the homestead entry of Nettles, or any other person.

For the foregoing reasons the motion is hereby denied.

RAILROAD GRANT—INDEMNITY SELECTION—ADVERSE CLAIM.

ALABAMA AND CHATTANOOGA R. R. CO.

A railroad indemnity selection that is not susceptible of approval at the time made, on account of a prior adverse claim, may be approved where such claim is subsequently relinquished.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1895. (G. C. R.)

The trustees for the lands of the Alabama and Chattanooga Railroad Company have, through their attorney, M. D. Brainard, of this city, appealed from your office decision of December 7, 1893, affirming the action of the register and receiver of April 25, 1883, rejecting a list of selections made by the company and filed in the local office on April 11, of that year.

Said list of selections embraced two hundred and forty acres, and the same was rejected as to one hundred and twenty acres thereof, because that number of acres included in the list had been previously entered. The selections so rejected are described as follows: E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 7, T. 11 S., R. 3 E., the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 31, T. 11 S., R. 4 E., Huntsville, Alabama.

Only the tract last described is involved in this controversy, no appeal having been filed as to the tract first above described.

It appears that one Charles A. Morton made homestead entry No. 2494 for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 31, on January 4, 1869. This tract is within the fifteen mile limits (indemnity) of the grant by act of June 3, 1856 (11 Stat., 17), for the benefit of the Alabama and Chattanooga and the Tennessee and Coosa Railroad Companies, the withdrawal for the benefit of which was ordered in June, 1856.

The grant for the road last named was forfeited by act of September 29, 1890, leaving the claim only of the first named road to be considered.

The grant by its terms was one *in presenti*, and the fourth section contained the provision, that "if any of said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."

The time given to complete the road thus expired June 3, 1866. The act of April 10, 1869 (16 Stat., 45), "revived and renewed" the grant of June 3, 1856, and extended the time for the completion of the road

to April 10, 1872, and it is alleged that the road was completed within the time so required.

By departmental order of August 15, 1887, the indemnity withdrawal for the benefit of said company was revoked, but prior thereto, as above seen (April 11, 1883), the company applied to select the forty acres in question; subsequently, on April 29, 1887, Melvina Morton, widow of Charles A. Morton, deceased, relinquished her claim to said tract to the United States, thus leaving the question wholly between the company and the United States.

Your office held that

The entry of Morton, however, having been after the expiration and before the revival of the railroad grant is deemed valid under the third section of the act of April 21, 1876 (19 Stat., 35), and being of record at the date of the company's application to select, operated to defeat its right to make such selection.

When the road was located, and maps were made, the right of the company to the sections granted became complete, and the right to the lands in the indemnity belt was only a float, and attached to no specific tracts until the selections were made in the prescribed manner. *Ryan v. Railroad Company*, 99 U. S., 382.

While the selection in question could not properly have been allowed at the time made by reason of Morton's entry, yet it now appears that such entry never ripened into a patent, but was relinquished to the United States. That being true, I see no reason why the selection may not now be approved.

It is so ordered, and the decision appealed from is reversed.

PRE-EMPTION—MINOR HEIRS—TRANSMUTATION.

BECK *v.* STEINHAUS' HEIRS.

Where a pre-emptor dies leaving an unperfected pre-emption claim it is lawful for the minor heirs, acting through their guardian, to transmute the filing to a homestead entry.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 26, 1895. (I. D.)

The defendants in the case of *Wm. B. Beck v. The Heirs of M. Steinhaus*, deceased, appeal from your office decision of April 6, 1893, involving the SE. $\frac{1}{4}$ of Sec. 10, T. 2 N., R. 31 W., McCook land district of Nebraska, in which you hold their homestead entry illegal.

Mrs. Matilda Steinhaus filed her pre-emption declaratory statement on July 30, alleging settlement July 28, 1888. She died January 11, 1889, leaving only minor heirs, and John Steinhaus, their guardian, made proper proof within the life of the pre-emption right and was granted an extension of time within which to make payment under joint resolution of Congress of September 30, 1890 (26 Stat., 684), until April 28, 1892. On April 28, 1892, said guardian upon showing his inability to

make payment was allowed by the local officer to transmute the decedent's filing to a homestead entry for said minor heirs.

On September 13, 1892, the plaintiff, Beck, filed his affidavit of contest, charging this transmutation from pre-emption to a homestead, to be illegal and fraudulent, and asking for a hearing.

On December 13, 1892, your office, without a hearing, by letter "G," decided that the homestead entry so made was illegal and held the same for cancellation in these words: "The transmutation of the pre-emption filing to a homestead entry is a personal privilege to be exercised only by the pre-emptor." Mary Hanley (3 L. D., 273), and the syllabus in the case cited says:

A qualified pre-emptor settled in 1858, filed in 1872, and died in 1881, without entering. His widow transmuted to a homestead in 1883.

Held: That she could not lawfully make the transmutation but that *as his pre-emption right had expired* before his death, she may be treated as an original homestead claimant, whose right may be regarded (in the absence of adverse interests) as beginning at date of his death.

In this case the pre-emption right had not expired and under section 2269, Revised Statutes, the right is given to complete the title for the heirs; and one of the ways by which title by pre-emption filing may be completed is by transmuting to a homestead entry; such a transmutation may be made, if within the time within which pre-emption payment might legally be made. The extension of one year did not deprive them of any rights then existing but simply operated to extend the time within which to act.

Under said section 2269, it is provided that "It should be competent for the executor or administrator of the estate of such (deceased) party or one of his heirs, to file the necessary papers to complete the same."

In this case the heirs being all minors, they acted by their guardian in taking the steps necessary to complete the title they were entitled to, by virtue of the entry and compliance with the law of their ancestor.

On December 30, 1892, after your office letter holding the homestead entry illegal, the guardian tendered payment to the local officers under the pre-emption proof theretofore filed by him, which payment was refused because the extension had expired, and the application to transmute to a homestead had been made.

Your office decision holds that Beck is entitled to a preference of entry because of the expiration of the extension for payment under pre-emption and the illegality of the homestead entry, but the attempt of the guardian to complete the title of his wards by transmutation to a homestead entry can not be considered an abandonment of their rights even if the rights of minors would in any case be permitted to be lost by the mistake of the land officers, and if the homestead entry for any reason had been invalid, yet the minor heirs should not lose their rights to the land by such mistake, but should be allowed to make payment under the pre-emption entry.

Your office decision is reversed and the transmuted homestead entry will be held intact.

OSAGE LAND—ALIENATION—CONFIRMATION.

WILLIAM RANDOLPH.

The fourth section of the act of May 28, 1880, recognizes the right of an Osage entryman to sell the land covered by his entry after submission of final proof, and payment of the first installment of the purchase price.

An entry may be confirmed under the body of section 7, act of March 3, 1891, as to a specific sub-division held by a transferee, and under the proviso as to the remainder of the land, if no action, adverse to the entry, has been taken within the period fixed by the statute.

The fact that an Osage entryman had previously made a pre-emption filing does not defeat confirmation under said section.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1895. (G. C. R.)

On November 20, 1890, your office held for cancellation Osage entry No. 4289, final certificate No. 3650 (Garden City series), made by William Randolph, for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 11, T. 31 S., R. 22 W., Dodge City land district, Kansas, it appearing from the proof that he had made a former pre-emption filing.

He appears to have made final proof (including his final affidavit) March 30, 1887, his first payment April 8, following, and on November 15, 1887, he paid in full for the land, and on same day received his final certificate.

No appeal was filed from said decision, but on March 29, 1892, he filed an abstract of title to the land, and asked that the entry be confirmed under section 7 of the act of March 3, 1891.

On December 1, 1892, your office denied the motion, on the grounds that the abstract showed that one-half of the land was sold, July 10, 1887, prior to the issuance of final certificate, and that said section 7 confirmed entries only where the right of the transferee attached prior to March 1, 1888, and where the final certificate was issued. No appeal was filed from that decision.

On June 20, 1893, Randolph's attorney filed a petition to have the entry passed to patent under the proviso to said section 7, the entry having remained in your office for two years before adverse action was taken, and no protest or contest having been filed against the same.

On December 5, 1893, your office passed upon the petition, and held that, as the transferee is debarred from obtaining title by virtue of the body of said section 7, it follows that the same reasons would debar the approval of the entry under the proviso thereto. The petition was again denied, and the entry held for cancellation.

On March 30, 1894, he appealed from that decision; the same not having been filed within the time allowed by Practice Rule 86, your office declined to transmit the same to this Department. Thereupon, he presented his petition for certiorari, asking that the record be sent to this Department, and that the entry be reinstated. On December

26, 1894, said petition was considered, and your office was directed to certify the proceedings to this Department.

It will be noticed that there are no contests or protests against this entry, and no fraud is charged against the entryman or the transferee.

The final proof (including the final affidavit of the entryman) was made March 30, 1887, and the first payment or installment was made April 8, following. The final proof, as submitted March 30, 1887, and the first installment of the purchase price paid a few days thereafter, entitled the entryman to final certificate. Having made this proof and payment, he had the right to sell the land, the same being then charged only with the deferred payments.

The Osage lands are disposed of under the act of May 28, 1880 (21 Stat., 143), and the fourth section thereof clearly recognizes the validity of a sale made by the entryman after final proof and payment of first installment of purchase money.

The entryman sold one-half the land—a distinct subdivision (W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$)—July 30, 1887; while this sale was made before he received final certificate (November 15, 1887), yet, as before seen, he then had the right to sell (William R. Sisemore, 18 L. D., 441), and being a specific subdivision of the tract entered (Snow *v.* Northey *et al.*, 19 L. D., 496), and the sale having been made prior to March 1, 1888, the part of the entry so sold is confirmed under the body of said section 7.

More than two years elapsed from the issuance of the receiver's receipt upon the entry before action was taken by your office, holding the entry for confirmation. To defeat confirmation under the proviso, action must be taken within two years from date of receiver's receipt. Ira M. Bond, 15 L. D., 228; United States *v.* De Lendrecie, 12 L. D., 610. Nor does it make any difference that the Osage entryman had made a former pre-emption filing; in such case, the entry is confirmed, if all the essential conditions are present authorizing such action, though the entryman had made a previous filing. Jairus Lincoln, 16 L. D., 465.

The decision appealed from is accordingly reversed, and the entry, as a whole, will be confirmed.

ENTRY IN TWO LAND DISTRICTS—SUSPENDED TOWNSHIP.

LEMUEL L. SQUIRES.

Where a homesteader applies to enter land situated in two land districts, and files simultaneously in each district an application for the specific sub-division lying within said land district, and one of said applications is allowed, and the other rejected on account of the suspension of the township, the rejected application may be revived and allowed as of its original date, on the removal of the suspension, and where it also appears that the applicant has remained in possession of the land and improved the same, and no adverse claim exists.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1895. (P. J. C.)

The land involved in this appeal is the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 33, T. 5 S., R. 77 W., 6 P. M., Central City, Colorado, land district.

It appears that Lemuel L. Squires made homestead entry on August 19, 1892, of said tract, under section 2289 of the Revised Statutes. In his application he stated—"I made homestead entry No. 707 at Leadville Land Office for W. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 4 in Tp. 6 south of range 77 W., 6 P. M., on the 26th day of July, 1890, and am still living on said land."

Your office, by letter of January 25, 1893, held the entry for cancellation, upon the ground that it was "made under the fifth section of the act of March 2, 1889, as additional to the prior entry, and inasmuch as his first entry was made subsequent to the passage of the act of March 2, 1889, he is not qualified to make a second entry under the provisions thereof." From this decision Squires appealed.

This finding was clearly erroneous, from the fact that the entry was not made under the act of March 2, 1889, but under section 2289, as amended by section five of the act of March 3, 1891 (26 Stat., 1098). It seems to have been made just as an original homestead entry, and was accepted as such apparently by the local officers, notwithstanding his statement that he had made a former entry, as quoted above.

This action is explained by applicant's corroborated affidavit filed with his appeal.

It is shown by the appellant that on July 12, 1890, he made out and mailed simultaneously two applications for the two tracts above described; for that in section 4 to the Leadville office, and that in section 33 to the Central City office; the land in each application being situated in the respective land districts; that the one sent to Leadville was accepted, while that sent to Central City was rejected, because the township had been suspended December 12, 1883; that the suspension was removed in July, 1892, and thereupon he made the entry under consideration. Informal inquiry in your office verifies the statement of appellant as to the suspension and removal thereof. It is also shown that the two eighty acre tracts are divided by the land district, township and section lines, but lying contiguous; he settled on said land in May, 1890; that he has continued in the peaceable possession of all of it, and made more than ordinarily valuable improvements thereon; "that the said application No. 1014 (the one under consideration) was made and intended to revive the one first made on July 12, 1890, and complete the entry first applied for."

It seems to me that there is no legal objection to considering this application as a revival of the former. It will be conceded that he was entitled to enter one hundred and sixty acres of land. The land being in two land districts, he made simultaneous applications in each. They were sent by mail; one accepted, and the other rejected, but not because of any laches on his part. The government had suspended the town-

ship, and it was not therefore subject to entry, but the moment the suspension was removed his application was accepted.

I think under these circumstances, there being no adverse claims, and it being simply a question as between the entryman and the government, the entry should be allowed to stand as of the date of the first application, so that his entry may be considered as an entirety.

There can be no doubt of the right of the entryman to make entry of land situated in two land districts, as in this case. This question was decided by Mr. Commissioner Burdett in 1874, in the case of E. C. Mason (6 C. L. O., 172), and again by Mr. Commissioner McFarland, in 1882, in the case of Edward Westgate (1 L. D., 438). The latter case gives in detail the manner of making final proof, and should be followed in the case at bar.

Your said office judgment is therefore reversed, and his entry will remain intact.

S. V. REHART.

Motion for review of departmental decision of December 13, 1894, 19 L. D., 505, denied by Secretary Smith, April 26, 1895.

HOMESTEAD ENTRY—INDIAN RESERVATION.

NATHANIEL J. HUMPHREY.

A homestead entry of land included within an executive order directing a survey for the purpose of establishing an Indian reservation may stand, where the subsequent order creating said reservation omits the land so entered.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1895. (J. L. McC.)

Nathaniel J. Humphrey has appealed from the decision of your office, dated June 21, 1893, holding for cancellation his homestead entry, made November 25, 1892, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 6 S., R. 42 E., Miles City land district, Montana.

The ground of said decision was that the entry was made in violation of executive order, and of departmental instructions issued in pursuance thereof.

The entryman appeals, alleging that the land in question is not within the limits of any withdrawal by executive order or departmental instructions.

In order to determine this question of fact, the records bearing upon the subject must be carefully examined.

The departmental order of June 22, 1886 (referred to in the decision of your office), in so far as it relates to the land in question, reads as

follows (see Indian Division "Record of letters sent," Vol. 45, page 474):

It will be seen that the Northern Cheyenne Indians have been gradually locating themselves upon the Tongue and Rosebud rivers in Montana; that a reservation has heretofore been temporarily created embracing those on the Rosebud river, with the intention of removing all those Indians upon said reservation; that the Tongue river Indians have refused to remove; and that settlers who have been enclosed within the reservation are complaining, and urging that the land be thrown open to the public domain.

It has been finally determined that the best and most satisfactory solution of the question is to have sufficient lands on the Rosebud and Tongue rivers, where the Indians are located, surveyed, to enable the Department to locate the Indians upon Indian homesteads. . . . You are hereby directed to cause a *sufficient quantity* of the land in the locality designated to be surveyed and subdivided, to enable the Department to locate these Indians upon Indian homesteads. Pending the survey and until the location of the Indians shall have been completed, you will not allow any locations or filings by whites, or other than Indians, upon the lands thus surveyed—except that white or other settlers who made settlements within the boundaries of the temporary reservation prior to November 26, 1884, upon lands not in possession or occupation of Indians, may be allowed to enter the tracts upon which their improvements are situated, to the extent allowed by the public land laws. The same will also be allowed to those settlers upon land which may be allowed outside of the boundaries of the temporary reservation, provided such settlers were upon the lands prior to this date, and had in no manner wrested them from the possession or occupation of the Indians.

The above letter, ordering the survey and withdrawal from entry of "sufficient lands on the Rosebud and Tongue rivers," to serve the purpose indicated, did not specifically describe the lands. But on the same day (June 22, 1886), your office issued instructions, by telegraph, to the surveyor-general of Montana, as follows:

Make contract with reliable deputy, at minimum rates if possible, without advertisement, for exterior and subdivisional surveys in the valley of Rosebud river within Cheyenne reservation, and in Tongue river valley *between three south and eight south*, payable from appropriation for current fiscal year; subdivisional surveys not to extend to greater distance from rivers than necessary to include agricultural lands in the valleys. *The surveyed land will not be open to entry until Indian homesteads have been located by Department.*

On September 3, 1886, the Department wrote to your office as follows (see Indian Division "Record of letters sent," Vol. 46, page 445):

I transmit herewith copy of a letter of the 2d instant, with enclosure from the Commissioner of Indian Affairs, in relation to the suggestion of Agent Upshaw, of Tongue river agency, Montana, in order that sufficient lands may be secured for allotments in severalty to the Northern Cheyenne Indians of said agency, and also for agency purposes. The agent suggests that any unoccupied lands by whites legally on both banks of the Tongue river in Montana, *from the mouth of Stebbin's creek to the mouth of Hanging Woman's*, be not allowed to be located or filed on, until the Indians are located; and that a sufficient quantity of land be reserved from location for agency purposes, in two separate tracts, for such period of time as may be deemed necessary—in which the Commissioner of Indian Affairs concurs.

Up to this stage of the proceedings, no order of withdrawal had been issued to the register and receiver of the district in which the

land lies, and before examining the order that afterwards was issued, it may be instructive to observe the fact that a slight discrepancy exists in the documents hereinbefore quoted from, as to what lands should be withdrawn. The Secretary's order of June 22, 1886, directed your office not to allow any locations or filings by whites on the lands surveyed—whatever they may be. Your office order, by telegram of same date, directed the surveyor-general to survey lands "in Tongue river valley between three south and eight south;" the Indian agent at Tongue river agency recommended the withdrawal of lands "from the mouth of Stebbin's creek to the mouth of Hanging Woman's" creek. An examination of the map of the Tongue river valley shows that the recommendation of the Indian agent, and the instructions of your office to the surveyor-general, do not cover precisely the same land. Stebbin's creek enters Tongue river about two miles north of the north line of Sec. 3; Hanging Woman's creek enters the same river about sixteen miles north of the south line of Sec. 8.

The order of your office, dated October 25, 1886, withdrawing lands in the Tongue River Valley, followed substantially the suggestion of the Indian agent; it withdrew lands on the east side of the river, from the mouth of Stebbin's creek to the mouth of Hanging Woman's creek, and on the west side from the mouth of Stebbin's creek to the mouth of Cook creek—a distance about two miles less. In other words, your office, in interpreting and carrying into effect the departmental order of June 22, 1886, found that its direction to reserve from settlement and entry a "sufficient quantity" of land to enable the Department to locate the Indians in the vicinity upon Indian homesteads, could be carried out by withdrawing a somewhat less quantity of land than had been surveyed.

The question at issue in this case is, whether the entry is invalid because within the limits of the *survey* ordered and made, although *not* embraced in the subsequent order of withdrawal?

I do not think this position can be maintained. The land embraced in Humphrey's entry never having been withdrawn, said entry should remain intact, subject to his compliance with the provisions of the homestead law.

Your office decision appealed from is therefore reversed.

ABANDONED MILITARY RESERVATION—ACT OF MAY 1, 1888.

FORT ASSINIBOINE.

The lands formerly embraced in Fort Assiniboine military reservation, and subsequently excluded therefrom by executive order, and also included within the Indian lands ceded under the agreement ratified by the act of May 1, 1888, are not disposable under the third section of said act, but under the act of July 5, 1884, as part of an abandoned military reservation.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 26, 1895. (F. W. C.)

I am in receipt of your office letter of February 8, 1895, submitting for the consideration of this Department the question as to whether the lands excluded from the Fort Assiniboine reservation in Montana are subject to entry under the provisions of the act of May 1, 1888 (25 Stat., 133), or subject to disposition under the act of July 5, 1884 (23 Stat., 103), providing for the disposal of abandoned military reservations.

In accordance with the treaty proclaimed April 25, 1856 (11 Stat., 657), and the amendatory act of April 15, 1874, (18 Stat., 28) there was set apart and reserved for the use and occupation of the Blood, Gros Ventres, Blackfeet, River Crows, Piegan and other Indians, a large quantity of lands in the northern part of the then territory of Montana.

Under the eighth section of the treaty of 1856, which provided that the United States might establish military posts within said reservation the President on March 2, 1880, upon the request of the Secretary of War, reserved within said reservation certain lands at the post of Fort Assiniboine. The boundaries of said military reservation were more correctly described in the executive order approved by the President June 16, 1881.

The military reservation thus declared was still in force on May 1, 1888, when Congress passed an act entitled "An Act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana and for other purposes."

By the agreement thus confirmed and ratified, the Indians ceded to the United States their right, title and interest in and to all the lands embraced in the reservation, created under the treaty of 1856, outside of certain smaller reservations therein described.

The lands within the military reservation of Fort Assiniboine fell within the ceded country.

By the third section of the act of May 1, 1888, it is provided:

That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

Just prior to the ratification of said agreement, to wit, on April 24, 1888, the Secretary of War recommended to the President a change in the boundaries of the military reservation at Fort Assiniboine, providing for a post reservation, hay reservation and coal field reservation, all within the boundaries of the original military reservation, and for the release from reservation of the lands not embraced within the

reservations therein described. This order was approved by the President on May 2, 1888, being the day following the approval of the act ratifying and confirming the agreement under which said Indians ceded the lands covered by said original military reservation.

It will thus be seen that the original military reservation declared in 1880 was reduced by the President's order of May 2, 1888.

On October 8, 1891, the Secretary of War recommended a further reduction of the military reservation reducing the quantity embraced in the post reservation, and recommended the discontinuance of the hay and coal reservations. This order was approved by the President October 9, 1891.

Your letter expresses the opinion that these lands upon their release from the military reservation became subject to the provisions of the third section of the act of May 1, 1888, and therein it is stated that a portion of the lands excluded from the original military reservation has been surveyed and a few entries—the number of which is not given, but which I learn upon inquiry at your office is about twenty—have been permitted to be made of a portion of the lands excluded from the military reservation, under the provisions of the act of May 1, 1888, but none of these entries have been permitted to go to patent.

From a careful consideration of the matter I am unable to agree with the opinion expressed in your office letter, namely, that these lands upon release from the military reservation, become subject to the provisions of the act of May 1, 1888 (*supra*).

In accordance with the provisions of the treaty with said Indians, under which the original Indian reservation was established, the President formally declared a military reservation of a portion of the lands within the limits of the Indian reservation. This military reservation was in force at the time Congress ratified the agreement made with the Indians by which they ceded all the lands originally reserved for their benefit, not embraced in the defined reservations therein provided for. Of the lands thus ceded the military reservation was but a very small part.

It may be presumed that Congress was aware of the existence of the military reservation at the time of the passage of the act of May 1, 1888, and it was surely not the intention of Congress that the lands thus reserved for military purposes were to be opened to entry under the provisions of said act.

It must therefore be held that the scope of the provisions of the act of May 1, 1888, embraced only those lands within the ceded country that fell without the military reservation. At this time there was in existence a special law providing for the disposal of lands within abandoned military reservations, namely, the act of July 5, 1884, *supra*, and it is not to be supposed that Congress intended by its general legislation governing the disposal of these ceded lands to repeal the act of 1884, so far as it might apply to any of the lands then embraced in

military reservations within the ceded country which might afterward be released from reservation. Had it been so intended the intention would have been more plainly expressed.

I am therefore of the opinion that the lauds formerly embraced within the Fort Assiniboine reservation, and subsequently excluded therefrom under the orders just recited, are not subject to the operation of the provisions of the third section of the act of May 1, 1888, but are disposable only as a portion of an abandoned military reservation.

PICKARD *v.* COOLEY.

Motion for review of departmental decision of October 9, 1894, 19 L. D., 241, denied by Secretary Smith, April 26, 1895.

SOLDIER'S ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

J. S. PILLSBURY ET AL. (ON REVIEW).

The act of March 3, 1893, authorizing a purchaser under a soldier's certificate of additional right to perfect title by paying the government price of the land, where said certificate is found invalid, is not applicable to a case wherein the certificate is held under a fraudulent power of attorney, and where an adverse claim thereto is asserted, and exercised, by the soldier in person prior to the location under said certificate; nor do the remedial provisions of the act of August 18, 1894, extend to an additional entry thus secured in fraud of the soldier's right.

Secretary Smith to the Commissioner of the General Land Office, April 27, 1895. (W. M. B.)

This is a motion filed by J. S. Pillsbury *et al.*, transferees, for review of departmental decision rendered January 31, 1895 (20 L. D., 91), in the case of *ex parte* J. S. Pillsbury *et al.*, involving soldier's additional homestead entry made by the said J. S. Pillsbury, transferee, on December 30, 1892, for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 154 N., R. 26 E. (120 acres), Duluth, Minnesota, land district; said entry having been made under and by virtue of a certificate of right, issued in the name of Sanders P. Perry, but fraudulently obtained.

Respecting motions for review, amended Rule 114 of Practice (18 L. D., 473), provides that—

Each motion must state concisely and specifically, without argument, the ground upon which it is based.

The motion before me makes a material departure from the plain and essential requirements of that portion of the rule as above quoted, in this, that it relates at length certain alleged facts of record in the case, the material portion of which was passed on in the departmental decision above referred to, and makes an argument thereon as grounds for the motion, instead of merely stating, under the mandatory provision of said rule, "concisely and specifically, without argument, the ground upon which it is based."

There are other and more essential reasons than that expressed above, however, why this motion should not be entertained.

The only material allegations of reversible error assigned are as follows:

1.—In holding, in effect, that J. S. Pillsbury, who had purchased in open market, for a valuable consideration, the additional homestead certificate issued by the Commissioner of the General Land Office to Sanders P. Perry, with the belief that the said certificate and the papers accompanying it authorizing its location, and sale of the land located with it, were genuine, was bound to accept as true the unsworn statement made to him by Sanders P. Perry in December, 1890, that said papers were fraudulent and forged, and were not executed by him, Perry.

4.—Error in failing to find that applicants are entitled to relief under the act of March 3, 1893 (27 Stat., 593) which provides:

“That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land.”

5.—Error in giving no effect to the provision of the act of August 18, 1894 (Pamphlet Stat., 53d. Cong. 2d. Session, page 397), validating all additional homestead certificates in the hands of bona fide purchasers for value, in the consideration of this case.

The provision of the act referred to is embraced in the following specific language—

That all soldier's additional homestead certificates heretofore issued under the rules and regulations of the General Land Office, under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right but the same shall be good and valid in the hands of bona fide purchasers for value, and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

There is no force or merit in the allegation contained in the first assignment of error, to the effect that the notice and information given Pillsbury on December, 1890, by Perry, respecting the fraudulency of the power of attorney by which it was proposed to assert his (Perry's) additional right under certificate, should have been under oath. The information as given to Pillsbury by Perry was sufficient to put the former on notice.

A hearing was ordered by your office for the purpose of determining the validity or fraudulency of the certificate and power of attorney claimed by Pillsbury to be genuine, and as the result of such hearing it was ascertained and held that the certificate of right was legal, but that the power of attorney under which entry was made was forged and fraudulent.

Pillsbury *et al.* withdrew from said hearing, not being present in person at same, nor represented thereat by attorney.

No entry was made by virtue of authority contained in the fraudulent power of attorney, nor any purchase of the land, entered under the certificate of right by Pillsbury, prior to December 30, 1892, thus giving Pillsbury about two years from date of notice (December, 1890), to fully investigate the character of the papers under which he was claiming; Perry testified at the hearing that he had never received any consideration whatever for the certificate of right held by Pillsbury, or for the land entered thereunder and purporting to have been sold by him (Perry) to Pillsbury *et al.*

It appears from the record that Perry, on November 27, 1891, and more than one year prior to the entry at Duluth, Minnesota, under which Pillsbury *et al.* claim, that he (Perry) had fully satisfied and exhausted his soldier's additional right by entry made at Tucson, Arizona.

The certificate under which a soldier most commonly makes his additional entry does not constitute the innate right by virtue of which such soldier claims the privilege of making said entry, but it merely bears evidence of the existence of such right, and if the soldier for whose benefit it is issued, and while it is outstanding, makes an entry in person, and that entry is allowed by action of your office, and the said action is affirmed by this Department, the additional right will be held to have been already satisfied and exhausted, and as invalidating an entry subsequently made through a forged and fraudulent power of attorney under a legal certificate.

Pillsbury *et al.* can claim no relief under provision of the act of March 3, 1893, above quoted, for the evident purpose and object of such provision was merely to protect entries where "there is no adverse claimant." It is true that there is no adverse claimant for the particular land claimed by Pillsbury *et al.*, but there was beyond question and dispute an adverse claimant in the person of Sanders P. Perry to the *additional right* which Pillsbury was attempting to assert through and by means of a fraudulent power of attorney, which said additional right was exercised and exhausted by Perry, in person, long before such right was asserted in making the entry at Duluth on December 30, 1892, which fact is sufficient to except the entry, made at the date last above mentioned, from the operation of said act of March 3, 1893.

Nor can the transferees obtain relief under provision of the act of August 18, 1894, for it cannot be claimed under the most liberal construction of that act that Congress ever contemplated the validating and reinstatement of entries made by a fraudulent power of attorney, where it is shown that the soldier for whose benefit the certificate of right was issued, as stated hereinbefore, never received any consideration for the same, or for the land entered therewith, and whose soldier's additional right had been exhausted by him in person previous to entry made under the certificate, by another not entitled thereto, by means of an invalid power of attorney.

For the foregoing reasons the motion is hereby denied.

COAL LAND ENTRY—ADVERSE CLAIM—FINAL PROOF.

BROAD v. RAY.

A possessory claim under the coal land act must be maintained and asserted in good faith, and for the use and benefit of the claimant only, to entitle him to be heard in his own right as against the application of another.

Final proof and payment on a coal land claim must be offered within one year after the expiration of the time allowed for filing a declaratory statement therefor.

Secretary Smith to the Commissioner of the General Land Office, April 27, 1895. (P. J. C.)

The plat of the official survey of T. 31 N., R. 1 E., was filed in the local office December 31, 1888.

The record shows that on February 20, 1893, Wilmot E. Broad filed coal declaratory statement for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 31 N., R. 1 E., Santa Fe, New Mexico, land district, alleging possession February 15, 1893; that David Ray, on July 18, 1893, filed coal declaratory statement for the SE. $\frac{1}{4}$ of Sec. 7, said township and range, alleging possession July 5, 1893.

On November 24, 1893, David Ray filed an application to purchase, which was endorsed as follows—"Application filed. Payment tendered and suspended. Notice given W. E. Broad, adverse claimant, to appear at this office and show cause why purchase should not be allowed."

In pursuance to said notice, a hearing was had before the local officers.

On April 10, 1894, Broad applied to purchase, which said application was "suspended pending decision on case of protest against the application of David Ray to purchase."

As a result of the hearing the local officers recommended that David Ray be allowed to purchase the tract applied for and that the protest of Broad be dismissed.

On appeal your office, by letter of September 28, 1894, affirmed the decision of the local officers, whereupon Broad prosecutes this appeal, alleging error as follows—

1. The Commissioner erred in holding that W. E. Broad failed to make his proof and payment under said D. S. within the time and in the manner required by law.

2. The Commissioner erred in holding that plaintiff Broad did not make his proof and payment within a year and sixty days from his actual possession of the premises in question.

3. He erred in not holding that although said Broad failed to file his D. S. within sixty days from date of actual possession, yet, having filed same before any other adverse interest or right was asserted to the land in question, he had one year from the filing of said D. S. within which to make this proof and payment.

4. Commissioner erred in holding that defendant Ray ever made any legal payment or tender of payment for said land.

On the application of Ray this case has been advanced on the docket and made special.

These entries are made under section 2348 of the Revised Statutes, which provides that any person or association of persons qualified who have opened and improved any coal mine and in actual possession of the same shall be entitled to a preference right of entry; section 2349 provides that claims under the preceding section must be presented in the proper office "within sixty days after the date of actual possession and the commencement of actual improvements of the land or filing of declaratory statement, but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office;" section 2350 provides, "and all persons claiming under section 2348 shall be required to prove their respective rights, and pay for the lands filed upon within one year from the time prescribed for filing their respective claims."

The real question involved in this controversy is as to whether Broad did not have possession of said lands he applied for, including that sought by Ray, long prior to the date of filing his declaratory statement.

The history of this tract of land, as I gather it from the testimony is as follows—

One A. C. Hunt, together with Broad, opened up a coal mine in the immediate vicinity of this land (whether on the identical tract in controversy or not it is not clear), in 1881. The land at that time was unsurveyed; quite a large quantity of the land, including that in controversy, was claimed by these parties. The coal mines were operated by Hunt and Broad for a few months. Some two thousand tons were shipped therefrom, when they leased the property to one Pascal Craig, who operated it for a short time, when these three parties, Broad, Hunt and Craig, transferred their right, title and interest in the property to the Amagre Coal Company. This transfer was made on September 19, 1881. In November, 1882, the directors of the said Amagre Coal Company, by resolution, ordered the transfer of the property of said company to the Monero Coal and Coke Company, a corporation organized under the laws of the State of Maine, whose principal officers were at Portland, Maine, and Boston, Massachusetts. The testimony shows that the land in controversy was included in these transfers; also that Broad was a very large stockholder in said company until about 1884; that the mines were operated, and that out of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 7 there were over two hundred thousand tons of coal extracted. It seems that this company sought to get title from the government to all their possessions, including the land in controversy, but were unable to do so, owing to the disqualification of one or more of the stockholders of said company, it being shown that one, at least, of them was interested in another filing made on other coal lands.

It appears that in 1887 one T. B. Catron, president of the Monero Coal and Coke Company, obtained a judgment against the company

for something over \$14,000. It appears that there was some sort of a trade made between Catron and the firm of Broad and Craig by which possession of the property was turned over to the latter under this judgment. This was done in January, 1892. It is shown that Broad and Craig, as a firm, gave their note to Catron for \$17,000. It is not shown when this note was to become due; at the date of the hearing it was said, "it has several years yet to run."

Broad claims that he had a bill of sale executed by Catron for this property, but is not able to state whether it was by him individually or as president of the Monero Coal and Coke Company. Catron, in his deposition, says that he has not sold or transferred the property, but

turned over said property into the management of Pascal Craig and W. E. Broad, as general manager of the company, with the understanding that the execution which I placed in the hands of Broad should be served upon the property, and the same sold to satisfy said judgment, and the proceeds thereof would be paid to me on a note given to me by said W. E. Broad and Pascal Craig, in payment for the said judgment assigned to them and my individual interest in the property.

He further says—

I have not sold or transferred the property. I have, as before stated, placed the property in the hands of Broad and Craig, in order that they might operate the same until it could be sold under the execution aforesaid, they to pay the net proceeds of the same to be applied on their note to me for said judgment and in reduction of said judgment and of said note.

It is shown by the testimony that the property has never been sold under said execution. Broad and Craig, however, took possession of the land in controversy in December, 1892, and operated it as a firm until February 15, 1893.

It is claimed that Broad then assumed Craig's portion of the indebtedness, and that the mining partnership ceased, the land being claimed by Broad. He leased the same to Craig, who operated the mine, paying Broad a royalty on the coal extracted. The most of the coal sold from the mine went to a railroad company during the period of this lease, and it is shown that it was all billed and paid for under the name of Broad and Craig. The title "Monero Coal Company" was also used during this period. It is not clear whether it was used entirely in connection with the store that seems to have been run in connection with the mine, or whether it was also used in relation to the mine itself. This "company" is said to have been composed of Broad, Craig and one Feast.

It will thus be seen that from the earliest history of coal on this land Broad has been prominently connected with it, he at one time owning a controlling interest in the stock of the Monero Coal and Coke Company, but so far as disclosed by the record his interest in that company ceased in 1884.

It is also apparent that Broad, and his associates, under one name or another, have been for a number of years despoiling the public lands

of coal without purchasing the same from the government. Their assumed right, without lawful authority to thus denude the public domain of its valuable deposit, has been shifted from one person, or company, or partnership, to another, as it became convenient for the purpose of avoiding a compliance with the law, always keeping in the forefront the same individuals who have reaped the profits of their unlawful espionage.

It will be seen by the testimony that if the Monero Coal and Coke Company ever had any interest in this land, it is still entitled to it, notwithstanding the action of its president in attempting to dispose of it; and by the admissions of its president, that company is disqualified to enter the same under the law. But be this as it may, I do not think the possession of Broad of this land is such a *bona fide* possession as entitles him to be heard to question the purchase of Ray. In the first place, it is not clear that he is acting in his own behalf. On the contrary, I am satisfied that he is not. Again, granting for the sake of argument that he did have possession, I am disposed to concur in the decision of your office affirming that of the local office in finding

that the inception of his possession was the date when he and his partner Craig took possession on February 15, 1892, and that the law obliged him to offer final proof and payment within one year after the expiration of the time for filing his declaratory statement, reckoning from said date last mentioned.

Your office judgment is therefore affirmed.

OKLAHOMA TOWN LOT—ABANDONMENT.

BETTS ET AL. v. TOWNLEY.

A town lot claimant who vacates a lot in obedience to an award made by a citizens committee can not be held by such action to have voluntarily abandoned his claim to said lot.

Secretary Smith to the Commissioner of the General Land Office, April 27, 1895. (G. B. G.)

I have this day examined the case of H. F. Betts and Frank Harrah against C. S. Townley, on appeal of Harrah from your office decision of March 3, 1894, awarding to said Townley lot 1, block 33, in Oklahoma City, Oklahoma Territory.

This case as originally presented, involved a question of priority of settlement between the said H. F. Betts, Frank Harrah and one D. E. Murphy, the said C. S. Townley claiming the lot in controversy, by virtue of purchase from Murphy.

There being three claimants for said lot, and a contest being initiated, after a hearing duly and regularly had, the townsite board No. 2 of Oklahoma, found that C. S. Townley is, and was at the time the legal title vested in said board, the legal occupant of said lot, and is, therefore, entitled to a deed.

On appeal, your office affirmed the decision of the townsite board, accepted the application of Townley for a deed, and rejected the respective applications of Betts and Harrah.

Betts has assigned and relinquished all of his alleged prior right and interest in the lot to Harrah, and the contest is now between Harrah and Townley.

It appears that Betts, Harrah and Murphy came to Oklahoma City on the north-bound train from Purcell, on the 22d day of April, 1889, which train reached Oklahoma at 2.10, P. M., of that day.

Betts and Harrah, each in his own behalf, and Murphy in behalf of Townley, state that they went on the lot in litigation immediately after 2.10 o'clock of that day, and each drove stakes and performed some other acts indicative of their respective intentions to claim the same.

The most peculiar phase of the testimony here appears. Each party states that he was first on the lot, and that he did not see either of the others thereon for some time afterwards. Betts and Harrah both state that Murphy never did locate or perform any acts of proprietorship on the lot until after the same was awarded to him by a citizens committee, but that his tent and stakes were on ground that was afterwards appropriated for a street.

It does not appear that either the townsite board or your office has passed directly on the question of priority of settlement.

The townsite board found "that H. F. Betts and Frank Harrah never perfected any settlement on said lot, nor did other act amounting to legal occupancy, sufficiently continuous and permanent in character to warrant a finding in favor of either of them."

Your office held that there were "serious doubts whether Betts or Harrah, or either of them, was the first occupant of said lot, but if they, or either of them, had a right to said lot, that right was abandoned after the committee made its award in favor of Murphy."

Leaving the question of prior settlement, it becomes necessary to notice the question that controlled both the townsite board and your office in the conclusion reached herein.

It is in evidence that immediately after the opening up of the Territory, a provisional government was formed for the government of Oklahoma City, and a citizens' committee of fourteen members was appointed to adjust matters between conflicting lot claimants. While this committee heard proof, and was not altogether arbitrary in its decisions, it was the outgrowth of the emergency of the hour, and was without any express warrant of law.

It is clear, however, that while the board had no legal authority to determine these controversies, it had the actual power behind it, supported by public sentiment, to enforce its decisions.

Murphy was a member of the board, and when said board went on the lot in controversy and called for the owner, Murphy claimed it, and while he did not participate in making the award to himself, the com-

mittee hurriedly awarded the lot to him. The evidence as to whether any protest against such award was made at the time by either Betts or Harrah, is conflicting. It is clear that they were both on the lot at that time, and it is altogether probable that they did protest, but it was either ignored by the committee, or was not heard, on account of the noise and great confusion, it appearing that five hundred to eight hundred people were following the committee from lot to lot, and that Murphy's proof was heard, if heard at all, amid great confusion, and according to the testimony of Mr. Blackburn, a member of the committee, adjusted the ownership of the lot in less than three minutes.

After the award was made, Betts and Harrah vacated the lot, in obedience to the mandate of the committee, and, as they allege, under protest and an assertion of ownership, coupled with a declaration that they would contest for their rights before the proper tribunal. There is no evidence that personal violence was threatened against either of them to prevent them, or either of them remaining on the lot, and for this reason it is urged that each of them voluntarily abandoned the lot after the action of said committee, and acquiesced in the award of the lot to Murphy, and your office holds that their leaving the premises, under the circumstances, was such an act of abandonment as worked a forfeiture of any right that either of them may have acquired by reason of settlement, or staking the same. In this conclusion I do not concur.

Betts and Harrah, in submitting to the dictation of the committee, but acted the part of prudent men and good citizens. It is in evidence that in other cases, where defeated claimants refused to abide the decision of the committee, that force was used, and it is a reasonable presumption that Betts and Harrah would have been forcibly ejected from the lot, and perhaps arrested for violation of a city ordinance, if they had attempted to remain thereon. It appears from the evidence that Harrah was told by Murphy that he, Harrah, must get off the lot, or he would throw his tent off.

Harrah told Murphy that although the committee had decided in his, Murphy's, favor, that he, Harrah, intended to hold the lot any way, and it further appears that the following notice was inserted in the Evening Gazette, a daily paper published in Oklahoma City, issue of May 22, 1890, in line with Harrah's previously avowed intention to prosecute his claim for the property. Said notice is in words and figures as follows:

Notice.

All persons are warned against purchasing lot 1, block 33, Oklahoma City, as I was the first occupant of said lot, and intend to set up claim to the same before the Townsite Commissioners.

FRANK HARRAH.

This notice is impotent, considered as a notice to Murphy's vendee, Townley, for the reason that it was subsequent to the purchase, but it is evidence of a continuing intention to prosecute his right to the property.

As a question of law, no notice to Townley was necessary. He could take no better right than was vested in his vendor, Murphy. The question then recurs to that of prior occupancy.

On this question the evidence is so unsatisfactory and conflicting, that I have been unable to reach a conclusion with any degree of certainty, and inasmuch as neither your office nor the local officers have rendered an opinion thereon, I have to remand the case with directions that a hearing be ordered on this issue.

Betts is no longer in the case, but Harrah will be permitted to show the prior occupancy of Betts, for the reason that he succeeds, by virtue of the aforesaid relinquishment and assignment, to whatever right of occupancy Betts had.

The judgment appealed from is reversed, and the cause is remanded for proceedings consistent with this opinion.

UMATILLA LANDS—ADDITIONAL ENTRY—CONVEYANCE.

COZBI TOWNSEND.

The right to make an additional entry of Umatilla lands conferred by section 2, act of March 3, 1885, upon persons whose claims were made fractional by the boundary line of said reservation crossing the same, may be exercised by the widow of a deceased homesteader.

Where a homesteader immediately prior to his death conveys his interest in the homestead tract to his wife, as his widow, and for the purpose of avoiding the expense that would otherwise attend the settlement of his estate, the instrument so executed, and for such purpose, though in form a deed, must be regarded as testamentary in character.

Secretary Smith to the Commissioner of the General Land Office, April 27, 1895. (J. I. P.)

On March 31, 1891, Cozbi Townsend, widow of Joshua D. Townsend, proceeding under section 2, act of March 3, 1885 (23 Stat., 341), made cash entry No. 11 of certain "Umatilla lands," La Grande, Oregon, land district, as follows—lots 5 and 11, Sec. 1; lot 1, Sec. 2; lots 1 and 2, Sec. 12; and lot 1, Sec. 11, T. 2 N., R. 32 E., containing 147.64 acres, claiming said entry as additional to the homestead entry No. 245 made by her husband, Joshua D. Townsend January 22, 1870.

By your office letter "C" of September 5, 1872, the entry of Joshua D. Townsend was suspended, because the lands embraced therein, except lot 6, Sec. 1, T. 2 N., R. 32 E., were within the limits of the Umatilla reservation.

The final proof of Joshua D. Townsend for said lot 6, Sec. 1, made June 29, 1876, and the issuance of final certificate No. 224, for said lot on said date, was held to be a waiver of his claim to the remaining tracts embraced in his entry, as the law then stood, and patent for said lot 6 was issued August 15, 1876.

Joshua D. Townsend died in 1882, after having by deed conveyed the tract embraced therein to his wife, for the purpose of avoiding the necessity of a will, and of saving to his estate the expense of administration. The additional entry of his widow, here involved, embraces the tracts included in her husband's original homestead entry, except certain portions thereof included in the grant to the town of Pendleton, in lieu of which other tracts were selected.

Your office, by its decision of December 6, 1893, held Mrs. Townsend's cash entry No. 11 for cancellation, on the ground, substantially, that the right of additional entry conferred by section 2 of the act of March 3, 1885, *supra*, is a personal one that can be exercised by the entryman only.

Mrs. Townsend appeals to this Department, alleging in substance that your office erred in holding that the widow or legal representative of an entryman could not make the additional entry provided for by section 2 of the act of March 3, 1885, *supra*, and in holding that the rule declared in the Englebright case (16 L. D., 350), controlled in the case at bar.

The question presented involves a construction of section 2 of the act of March 3, 1885, *supra*.

That section, or the first proviso thereof, which is the portion in point here, is as follows—

Provided, That persons who settled upon or acquired title under the pre-emption or homestead laws of the United States to fractional subdivisions of lands adjacent to the lines of said reservation, as now and heretofore existing, and at the time of the sale herein provided for, are residing on such fractions and have been unable to secure the full benefits of such laws by reason that the lands settled upon were made fractional by the boundary line of said reservation crossing such subdivision, shall have a right, at any time after advertisement and before sale at public auction, to purchase at their appraised value, so much of said lands as shall, with the fractional lands already settled upon, make the aggregate one hundred and sixty acres, and no additional residence shall be required of such *settler*, but *he* shall take and subscribe the oath required of other purchasers at the time of purchase.

Unquestionably the statute under consideration is a remedial one, and should be liberally construed. And in the construction of remedial statutes three things are always to be considered in order to ascertain the legislative intent, viz: "the old law, the mischief and the remedy." (Sutherland on Statutory Construction, sec. 409.) In the case of this statute, the "old law" was the homestead and pre-emption laws, the policy of which is to allow all qualified settlers and entrymen one hundred and sixty acres of the public domain, subject to compliance with their provisions. "The mischief" was that a large number of entrymen and claimants, without fault on their part, found their entries or pre-emption claims made fractional by the boundary line of the Umatilla Indian reservation, and to the extent that their claims or entries lay within the limits of said reservation, they found themselves short of the quantity of land allowed them by the homestead and pre-emption laws. "The remedy" intended by the act in question was to furnish a

means by which the deficiency in said fractional claims and entries might be made good, by an additional entry of a sufficient quantity of land, which, with the quantity embraced in the original claim or entry, would swell the whole to one hundred and sixty acres.

If the conclusion above reached as to the legislative intent be correct, it follows that a denial to the widow of an original entryman or claimant of the right to make such additional entry, would, in many instances, defeat the purpose of the act.

The acts of March 3, 1879 (20 Stat., 472), and July 1, 1879 (21 Stat., 46), were of similar purport to the one under consideration. They provided that—

any *person* who has under existing laws, taken a homestead on any even section within the limits of any railroad . . . land grant, and who by existing laws shall have been restricted to eighty acres, may enter, under the homestead laws an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry.

It will be observed that the language above quoted is not more restrictive than is that of the act in question. It apparently limits the right to make the additional homestead entry of eighty acres to the homestead entryman alone, yet this Department has held that the right to make an additional homestead entry under the acts above referred to can be made by the widow of the original entryman. (General Circular, 1892, page 25; Anna Anderson, 1 L. D., 24; see also case of William C. Pascoe, 1 L. D., 50, construing the act of June 15, 1880.)

I am of the opinion that the rule of construction applied to the acts of March 3 and July 1, 1879, applies with equal force to the act under consideration, and that the language of said act that "*persons* who settled upon and acquired title under the pre-emption or homestead laws" may be construed to include the widow of a homestead entryman. I am confirmed in that opinion in view of the fact that under the homestead law the widow of a deceased entryman stands first in the line of succession (Peter Kackman, 1 L. D., 76), and the homestead right cannot be devised away from the widow (General Circular of 1892, page 12), and that analogous legislation on the part of Congress has been construed to include the widow of a deceased entryman.

The case of Carrie A. Englebright (16 L. D., 35), construed a different statute, and was based on facts of a different character.

But the suggestion presents itself at this juncture, that by reason of the deed executed by her husband prior to his death, (to the original homestead) the rights of Mrs. Townsend in the premises are those of a purchaser only, and that as such her rights are no greater than would be those of any other purchaser, which, under the act in question, would be none at all.

Accompanying her application to purchase Mrs. Townsend filed an affidavit setting forth all the facts relative to said original entry, as

herein detailed, and concerning the execution of said deed she swears as follows:

That on the 18th day of June, 1882, my said husband, while we were residing on said land, died; that immediately prior to his death he conveyed his interest in said land to me as his widow; that said deed and conveyance was not made for any valuable consideration, but was only made in lieu of a will, and for the purpose of avoiding any litigation or expense in settling up his estate.

This instrument executed without any valuable consideration, immediately prior to the maker's death, and to his wife, not as such, but to her as *his widow*, conveys no present estate, but shows that the title was to vest in his widow, which could only occur after his death, and clearly "discloses the intention of the maker respecting the posthumous destination of his property," and that appearing, the instrument is testamentary in character, whatever its form, or the title he may have given it. (Jarman on Wills, Vol. 1, page 18).

In the case of *Lartor v. Lartor* (39 Miss., 760), an instrument, in form a deed, which purported to convey the maker's property to his wife during her widowhood, was held to be a will, and I cite that case, not only as a controlling authority on the question under consideration, but as being strikingly similar to the case at bar, in the facts and arguments therein presented to the court. (See also Redfield on Wills, Vol. 1, page 174, par. 11; *Id.*, page 189, par. 20.)

Without multiplying references to authority, it is clear to my mind that the instrument executed by the husband of Mrs. Townsend prior to his death, though in form a deed, was intended by him not to take effect until after his death, and hence was in fact and legal effect a will. Therefore Mrs. Townsend's rights in the premises are not those of a purchaser, but of a widow and devisee of the original entryman, and as such she is entitled to purchase the tract in question. (General Circular, 1892, page 25.)

Some doubt may be entertained as to the sufficiency of Mrs. Townsend's evidence alone, to establish the character of said so-called deed. But in a case of this kind, where the only parties in interest are the applicant and the government, where the evidence is not disputed, and good faith is apparent, a strict application of the rules of evidence, as in a trial court, is not demanded. Hence I am of the opinion that the *ex parte* showing made by Mrs. Townsend is sufficient.

Your office decision is reversed, and cash entry No. 11 of Mrs. Townsend is held intact.

INDIAN LANDS—EXTENSION OF TIME FOR PAYMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, April 16, 1895.

REGISTER AND RECEIVER,

O'Neill, Nebraska,

GENTLEMEN: Your attention is called to the provisions of the act of March 2, 1895 (Public No. 121), which are as follows:

That the homestead settlers on the Absentee Shawnee, Pottawatomie and Cheyenne and Arapahoe Indian lands in Oklahoma Territory be, and they are hereby, granted an extension of one year within which to make the first payment provided for in section sixteen of the act of Congress approved March third, eighteen hundred and ninety-one, entitled, "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes," and such payment may be made at any time within five years from the date of the entry of such lands. And that the like extension of one year on the first payment required to be made, when payable in installments, is hereby granted to all homestead settlers on and purchasers of all ceded Indian reservations in the States of North Dakota, South Dakota, Nebraska, Montana, and Idaho.

In view of this legislation, the first installment of the purchase money for Omaha Indian lands will not be due until December 1, 1895. The second and third installments will be due in one and two years thereafter, as the extension of time for the first payment necessarily carries with it an extension of one year beyond the time fixed for the second and third payments by the act of August 19, 1890 (26 Stat., 329).

The interest on the deferred payments, however, must be paid annually as heretofore.

Very respectfully,

S. W. LAMOREUX,

Commissioner.

Approved,

HOKE SMITH,

Secretary.

SECOND HOMESTEAD—ACT OF DECEMBER 29, 1894.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 23, 1895.

REGISTERS AND RECEIVERS,

United States District Land Offices.

GENTLEMEN: Your attention is called to the provision of an act of Congress approved December 29, 1894, entitled "An act to amend section 3 of an act to withdraw certain public lands from private entry,

and for other purposes, approved March second, eighteen hundred and eighty-nine." Section 3 of the act of March 2, 1889 (25 Stats., 854), reads as follows:

That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

And the provision added thereto by the amendatory act is as follows:

That if any such settler has heretofore forfeited his or her entry for any of said reasons, such person shall be permitted to make entry of not to exceed a quarter section on any public land subject to entry under the homestead law, and to perfect title to the same under the same conditions in every respect as if he had not made the former entry.

No party will be entitled to make a second entry under this act, unless his former entry is cancelled for any of the causes named, arising before December 29, 1894.

The applicant for such permission to make second entry will be required to file in the district land office having jurisdiction over the land he desires to enter, an application for a specific tract of land, and to submit testimony to consist of his own affidavit, corroborated by the affidavits of disinterested witnesses, executed before the register or receiver or some officer in the land district using a seal and authorized to administer oaths, setting forth in detail the facts on which he relies to support his application, and which must be sufficient to satisfy the register and receiver, who are enjoined to exercise their best and most careful judgment in the matter, that his former entry was in fact forfeited by reason of his inability, caused by a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself or those dependent upon him, upon the land settled upon.

The facts to be shown embrace the following, viz:

1. The character and date of the entry, date of establishing residence upon the land, and what improvements were made thereon by the applicant.
2. How much land was cultivated by the applicant, and for what period of time.
3. In case of failure or injury to crop, what crops failed or were injured or destroyed, to what extent, and the cause thereof.
4. In case of sickness, what disease or injury, and to what extent the claimant was thereby prevented from continuing upon the land, and if practicable a certificate from a reliable physician should be furnished.

5. In case of "other unavoidable casualty," the character, cause, and extent of such casualty, and its effect upon the land or the claimant.

6. In each case full particulars upon which intelligent action may be based by the register and receiver.

The foregoing is intended to indicate what facts should be set forth in the required affidavits, leaving with the register and receiver of the several district offices, the duty of making application of the law to the particular cases presented.

If the showing made by any party in support of the application under said act is satisfactory to you, you will allow him to make entry as in other cases.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH,
Secretary.

ALASKA—SALE OF PUBLIC LANDS.

INSTRUCTIONS.

The provisions of section 12, act of March 3, 1891, with respect to the sale of public land in the Territory of Alaska, should be construed to mean that Congress intended to permit persons or corporations to purchase only so much land as is occupied, that is, actually used for trade or manufactures, but in no case to exceed one hundred and sixty acres.

The language in said act "to be taken as near as practicable in a square form" should be construed to mean that the land actually used for trade or manufactures should be laid off as nearly as practicable in square form, but so taken as not to interfere with the occupancy for trade or manufactures of any other qualified person or corporation.

Secretary Smith to the Commissioner of the General Land Office, May 4, 1895.

You ask that I shall construe, for the guidance of your office, section twelve of the act approved March 3, 1891 (26 Stat., 1095).

The section of the act in question provides for the sale of public lands in the territory of Alaska to qualified natural persons and corporations who may occupy the same for the "purpose of trades or manufactures."

The exact question presented is: Will each person, or corporation, be permitted to buy as much as one hundred and sixty acres of land, or will the extent of each purchase be limited to the land actually occupied for trade or manufacture?

The question is by no means free from doubt, but after a careful consideration I have reached the following conclusion: The intention of

Congress was to permit a person or a corporation to purchase only so much land as is occupied, that is, actually used, for trade or manufacture, but in no case to exceed one hundred and sixty acres.

The language in the act, "to be taken as near as practicable in a square form," should be construed to mean that the land occupied—that is, actually used—for trade or manufacture should be laid off, as nearly as practicable, in square form, but so taken as not to interfere with the occupancy for trade or manufacture of any other qualified person or corporation.

As there are persons in the territory occupying lands for various business purposes and the land so occupied varies in extent and form according to the particular business, or manner of conducting such business, the quantity of land to be taken, as well as the form thereof, must be determined by the facts of each case.

DISTRICT OF COLUMBIA—REGULATIONS OF MARCH 31, 1894,
AMENDED.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, May 9, 1895.

Paragraph 4 of the regulations issued by this Department March 31, 1894, 18 L. D., 285, for carrying into effect a joint resolution of Congress, approved February 16, 1839, "directing the manner in which certain laws of the District of Columbia shall be executed," which reads "The Principal Clerk of Surveys of the General Land Office, is appointed Examiner General, and will discharge the duties appertaining to said office," is hereby so amended as to read "The Chief of Division of Public Surveys of the General Land Office is appointed Examiner General, and will discharge the duties appertaining to said office."

HOKE SMITH,
Secretary.

YANKTON INDIAN LANDS OPENED TO SETTLEMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 17, 1895.

REGISTER AND RECEIVER,
Mitchell, South Dakota.

GENTLEMEN: I have to call your attention to the proclamation of the President, dated May 16, 1895, together with the schedule of lands, copies of which are hereto attached,* by which the lands described in

* Schedule not included herein.

that schedule will be opened to settlement under the statutory provisions therein recited, at and after the hour of 12 o'clock, noon, central standard time, of the twenty-first day of May, 1895, being certain tracts embraced in the cession of the Yankton tribe of Sioux Indians, by agreement ratified and confirmed by the twelfth section of the act of Congress approved August 15, 1894 (26 Stats., pages 314 to 319).

You will observe that it is stipulated in Article 10 of the agreement referred to that—

Any religious society, or other organization now occupying under proper authority for religious or educational work among the Indians any of the land under this agreement ceded to the United States, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for these surplus lands.

You will at the proper time be furnished with a copy of a "Schedule showing lands reserved for religious organizations, school and Agency purposes, etc., on the Yankton Reservation in South Dakota".

Any religious society or other organization applying to purchase lands under said Article 10 must make proof, after six weeks publication, of its occupancy of such lands on December 31, 1892, the date of the agreement, and pay for the same at the rate of \$3.80 per acre, within two years from the date of the act ratifying the agreement.

With regard to the lands described in the schedule, you will observe that the act referred to provides—

That the lands by said agreement ceded to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: Provided, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

Each applicant to enter any of these lands as a homestead must have the qualifications required of any applicant for homestead entry under existing law. He must pay for the land entered at the time of making his original entry the sum of fifty cents per acre and at the time of making proof, whether under Sec. 2291 or 2301 R. S., the further sum of \$3.25 per acre in addition to the fees now required by law. No final commission will be collected where the party submits proof under Sec. 2301 R. S. and the commissions in the original entry and in final entry under Sec. 2291 R. S., will be computed at the rate of \$1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357 U. S. R. S. (See sections 2238 and 2290 U. S. R. S.)

It is stipulated by Article 8 of the agreement that the ceded lands shall be disposed of "to actual and bona fide settlers only", while the act ratifying the agreement provides that "the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged". No mention is made of sections 2306 and 2307 of the Revised Statutes, under which soldiers and sailors, their widows and orphan children are permitted, with regard to the public lands generally, to make additional entries, in certain cases, free from the requirement of actual settlement on the entered tract (see pages 23 and 24 of the General Circular of February 6, 1892). It is therefore, held that additional entries cannot be made for these lands under said sections 2306 and 2307, unless the party claiming will, in addition to the proof required on pages 23 and 24 of said circular, make affidavit that the entry is made for actual settlement and cultivation according to section 2291, as modified by sections 2301, 2304 and 2305 of the Revised Statutes, and the prescribed proof of compliance therewith will be required to be produced, and the additional payment will be required to be made before the issue of the final certificate.

Town-site entries will be made for said lands in accordance with the general laws applicable thereto (See Circular of July 9, 1886, 5 L. D., 265).

In addition to the usual original homestead receipt (form 4-137) for the fee and commissions, you will issue a receipt of form 4-140a for the purchase money paid when the original entry is made, and when the final payment is made, you will issue a receipt of like form in addition to the final homestead receipt (form 4-140) for the final commissions, except in cases where the party makes proof under Sec. 2301 R. S. when no final commissions will be collected and therefore, only one form of receipt (4-140a) will be issued.

You will report the purchase money in all cases upon your current cash abstracts, but, except when proof is made under Sec. 2301 R. S., no cash certificate will be issued. In all other respects you will use the ordinary homestead and town-site blanks in connection with the entry of these lands, continuing your regular series of numbers, but indicat-

ing upon the entry papers and abstracts that the entries for these lands are made under the act of August 15, 1894, Sec. 12.

Should any of the parties named in the second paragraph of the portion of the act quoted, file applications in your office for the purchase of the lands therein referred to, you will forward the same through this office for the consideration of the Department.

No comment appears necessary upon the closing paragraph of the said section 12.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH, *Secretary.*

[OPENING YANKTON RESERVATION.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Whereas, pursuant to section one, of the Act of Congress, approved July thirteenth, eighteen hundred and ninety-two, entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-three, and for other purposes", certain articles of agreement were made and concluded at the Yankton Indian Agency, South Dakota, on the thirty-first day of December, eighteen hundred and ninety-two, by and between the United States of America and the Yankton tribe of Sioux or Dacotah Indians upon the Yankton reservation, whereby the said Yankton tribe of Sioux or Dacotah Indians, for the consideration therein mentioned, ceded, sold, relinquished, and conveyed to the United States, all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said tribe by the first article of the treaty of April nineteenth, eighteen hundred and fifty-eight, between said tribe and the United States; and

Whereas, it is further stipulated and agreed by article eight that such part of the surplus lands by said agreement ceded and sold to the United States as may be occupied by the United States for agency, schools and other purposes, shall be reserved from sale to settlers until they are no longer required for such purposes, but all of the other lands so ceded and sold shall, immediately after the ratification of the agreement by Congress, be offered for sale through the proper land office, to be disposed of under the existing land laws of the United States, to actual and bona fide settlers only; and

Whereas, it is also stipulated and agreed by article ten that any religious society, or other organization, shall have the right for two

years from the date of the ratification of the said agreement, within which to purchase the lands occupied by it under proper authority for religious or educational work among the Indians, at a valuation fixed by the Secretary of the Interior, which shall not be less than the average price paid to the Indians for the surplus lands; and

Whereas, it is provided in the act of Congress accepting, ratifying and confirming the said agreement approved August 15, 1894, section 12 (Pamphlet Statutes, 53d Congress, 2d session, pages 314 to 319),

That the lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of the State of South Dakota: *Provided*, That each settler on said lands shall, in addition to the fees provided by law, pay to the United States for the land so taken by him the sum of three dollars and seventy-five cents per acre, of which sum he shall pay fifty cents at the time of making his original entry and the balance before making final proof and receiving a certificate of final entry; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Secretary of the Interior, upon proper plats and description being furnished, is hereby authorized to issue patents to Charles Picotte and Felix Brunot, and W. T. Selwyn, United States interpreters, for not to exceed one acre of land each, so as to embrace their houses near the agency buildings upon said reservation, but not to embrace any buildings owned by the government, upon the payment by each of said persons of the sum of three dollars and seventy-five cents.

That every person who shall sell or give away any intoxicating liquors or other intoxicants upon any of the lands by said agreement ceded, or upon any of the lands included in the Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight, shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars.

and;

Whereas, all the terms, conditions and considerations required by said agreement made with said tribes of Indians and by the laws relating thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with:

Now, therefore, I, GROVER CLEVELAND, *Président of the United States*, by virtue of the power in me vested by the Statutes hereinbefore mentioned, do hereby declare and make known that all of the lands acquired from the Yankton tribe of Sioux or Dacotah Indians by the said agreement, saving and excepting the lands reserved in pursuance of the provisions of said agreement and the act of Congress ratifying the same, will, at and after the hour of twelve o'clock, noon (central standard time), on the twenty-first day of May, 1895, and not before, be open to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement, the statutes hereinbefore specified and the laws of the United States applicable thereto.

The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of Lands within the Yankton Reservation, South Dakota, to be opened to settlement by Proclamation of the President", and which schedule is made a part hereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 16th day of May, in the year of our Lord, one thousand eight hundred and ninety-five,
[SEAL.] and of the Independence of the United States, the one hundred and nineteenth.

GROVER CLEVELAND.

By the President,

EDWIN F. UHL

Acting Secretary of State.

REGULATIONS CONCERNING THE SELECTION OF DESERT LANDS BY CERTAIN STATES.

Section 4 of the act of August 18, 1894, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes" (28 Stat., 372-422), authorizes the Secretary of the Interior, with the approval of the President, to contract and agree to patent to the States of Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, North Dakota, and South Dakota, or any other States, as provided in the act, in which may be found desert lands, not to exceed 1,000,000 acres of such lands to each State, under certain conditions.

The text of the act is as follows:

SEC. 4. That to aid the public land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by

the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury, not otherwise appropriated, one thousand dollars.

1. The second paragraph of the section requires that the State shall first file a map of the land selected and proposed to be irrigated, which shall exhibit a plan showing the mode of contemplated irrigation and the source of the water. In accordance with the requirements of the act, the State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement of the amount of water available for the plan of irrigation will be necessary. The other data required can not be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the land selected must be submitted.

2. The map must be on tracing linen, in duplicate, and must be drawn to a scale not greater than 1,000 feet to 1 inch. A smaller scale is desirable, if the necessary information can be clearly shown.

3. The map and field notes in duplicate must be filed in the local land office for the district in which the land is located. A plan and field notes covering tracts selected in several land districts need be filed but once in duplicate; one copy in the other districts will be sufficient. The map and field notes must show the connections of termini with public survey corners, the connections with public survey corners wherever section or township lines are crossed by the irrigation works proposed, and must show full data to admit of retracing the lines of the survey of irrigation works on the ground.

4. The map should bear an affidavit of the engineer who made or supervised the preparation of the map and plan, form 1, page 443, and also of the officer authorized by the State to make its selections under the act, form 2, page 443.

5. The map should indicate clearly the tracts selected, which must all be desert lands as defined by the acts of 1877 and 1891, and the

decisions and regulations of this office therein provided for. The language of the former act and the decisions thereunder are as follows: "All lands exclusive of timber lands and mineral lands, which will not, without artificial irrigation produce some agricultural crop, shall be deemed desert land." It is prescribed also as follows:

First. Lands bordering upon streams, lakes, or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water, or living spring, are not subject to entry under the desert land law until the clearest proof of their desert character is furnished.

Second. Lands which produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons, are not desert lands.

Third. Lands which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, are not desert.

Fourth. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

6. The map should be accompanied by a list in triplicate of the lands selected, designated by legal subdivisions. When a township has not been subdivided, but has had its exteriors surveyed, the whole township may be selected, but no patent can issue thereon until the land has been surveyed. This list should be dated and verified by a certificate of the selecting agent, form 3, page 444. The party appearing as agent of the State must file with the register and receiver written and satisfactory evidence, under seal, of his authority to act in the premises.

7. The lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and found correct in all respects they will so certify at the foot of each list, form 4, page 444, and number the lists in consecutive order, beginning with No. 1. The register will thereupon post the selections in ink in the tract book after the following manner:

"Selected ———, 18—, by A. B., agent for the State of ———, as desert land, act of August 18, 1894, list No. ———," and on the plats he will mark the tracts so selected "State desert land selection." After the selections are properly posted and marked on the records, the lists, papers, and maps will be transmitted to this office accompanied by the evidence of the agent's appointment. It is required that clear lists of approvals shall in every case be made out by the selecting agents, if after the above examination one or more tracts have been rejected, showing clearly and without erasure the tracts to which the register is prepared to certify, also the aggregate area properly footed in the columns and set forth in the certificate.

For rejected selections a new application and a new list will be required, upon which the register will note opposite each tract the

objections appearing on the records, and indorse thereon his reasons in full for refusing to certify the same. The agent will be allowed to appeal in the manner provided for in the Rules of Practice. Lists containing erasures received at this office will not be filed, but will be returned for perfection. Form of title page to be prefixed to the lists of selections will be found on page 444, marked A. On the map of lands selected the register will mark *rejected* such tracts as he has rejected on the lists.

8. To the list of selections must be added a contract of form 5, page 445, signed by the State agent authorized to make such contract.

9. When the canals or reservoirs required by the plan of irrigation cross public land not selected by the State, an application for right of way over such lands under sections 18 to 21, act of March 3, 1891 (26 Stat., 1095), should be filed separately, in accordance with the regulations of February 20, 1894.

EDW. A. BOWERS,
Acting Commissioner.

Approved November 22, 1894,

HOKE SMITH,
Secretary of the Interior.

FORM 1.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says he is the engineer under whose supervision the survey and plan hereon was made (or is the person employed to make, etc.) for the State of _____, and under its authority; that the tracts shown hereon to be selected are each and every one desert land as contemplated by the act of Congress approved August 18, 1894 (28 Stat., 372-422); none being of the classes designated as timber or mineral lands; that the plan of irrigation herewith submitted is accurately and fully represented in accordance with ascertained facts; that the system proposed is sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary crops; and that the survey of said system of irrigation is accurately represented upon this map and the accompanying field notes.

Subscribed and sworn to before me this _____ day of _____, 189—.

[SEAL.]

_____,
Notary Public.

FORM 2.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the _____ (designation of office) authorized by the State of _____ to make desert land selections under the act of Congress approved August 18, 1894 (28 Stat., 372-422); that _____, who subscribed the foregoing affidavit, is the engineer under whose supervision the survey and plan hereon were made (or is the person employed to make, etc.) under the authority of the State; that the plan of irrigation and survey herewith is submitted

under authority of the State of —; and that the tracts shown hereon to be selected are each and every one desert land, as contemplated by the said act of Congress, none being of the classes designated as timber or mineral lands.

Subscribed and sworn to before me this — day of —, 189—.

[SEAL.]

_____,
_____,
Notary Public.

FORM 3.

STATE OF _____,

County of _____, ss:

I _____, being duly sworn, depose and say that I am _____ (designation of office), authorized by the State of _____ to make desert land selections under the act of Congress approved August 18, 1894 (28 Stat., 372-422); that the foregoing list of lands which I hereby select is a correct list of lands selected under said act; that the lands are vacant, unappropriated, are not interdicted timber nor mineral lands, and are desert lands as contemplated by the said act of Congress.

Subscribed and sworn to before me this — day of —, 189—. [L. S.]

[SEAL.]

_____,
_____,
Notary Public.

FORM 4.

UNITED STATES LAND OFFICE,

_____,
_____, 189—.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected _____, 189—, by _____, the duly authorized agent of the State of _____, under the provisions of the act of Congress approved August 18, 1894 (28 Stat., 372-422), and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof returned and denominated as mineral or timber lands; nor is there any homestead or other valid claim to any portion of said lands on file or record in this office; and that the said lands are, to the best of our knowledge and belief, desert lands as contemplated by the said act of Congress.

_____, Register.
_____, Receiver.

A.

STATE OF _____,
UNITED STATES LAND OFFICE,

_____, 189—.

_____, the duly authorized agent of the State of _____, under and by virtue of an act of Congress approved August 18, 1894 (28 Stat., 372-422), and in pursuance of the rules and regulations prescribed by the Secretary of the Interior, hereby makes and files the following list of selections of desert public lands which the State is authorized to select under the provisions of the said act of Congress, the selections being particularly described as follows, to wit:

FORM 5.

These articles of agreement, made and entered into this — day of —, A. D. 189—, by and between —, Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and —, for and on behalf of the State of —, party of the second part, witnesseth:

That in consideration of the stipulations and agreements hereinafter made, and of the fact that said State has, under the provisions of section 4 of the act of Congress approved August 18, 1894, through —, its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character, and particularly described as follows, to-wit: (here insert description of land), and has filed a map of said lands, and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed, and the source of the water to be used for that purpose, the said party of the first part contracts and agrees, and, by and with the consent and approval of —, President thereof, hereby binds the United States of America to donate, grant and patent to said State, or to its assigns, free from cost for survey or price, such parts of said lands as said State or its assigns may cause to be irrigated, reclaimed, occupied and cultivated, in accordance with the provisions of said act of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time prior to the 18th day of August, 1904.

It is further understood that said State shall not lease any of said lands or use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement; and that in selling and disposing of them for that purpose the said State may sell or dispose of not more than 160 acres to any one person, and then only to bona fide settlers who are citizens of the United States, or who have declared their intention to become such citizens; and it is distinctly understood, and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said act of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

It is further understood and agreed that said State shall have full power, right and authority, to enact such laws, and from time to time to make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation, reclamation, settlement and cultivation thereof as is required by this contract and the said act of Congress; but no such law, contract or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said act of Congress, and then only after the requirements of said act and contract have been fully complied with.

Neither the approval of said application, map and plan, nor the segregation of said land by the Secretary of the Interior, nor anything in this contract, or in the said act of Congress, shall be so construed as to give said State any interest whatever in any lands upon which there may at the date of this contract be an actual settlement by a bona fide settler, qualified under the public land laws to acquire title thereto; nor to any lands which are, in fact, nondesert in character, and not subject to entry under the desert land laws of the United States; and any person may at any time before said State shall have finally disposed of the same, institute a contest before the register and receiver of the district in which said land is situated upon an allegation that any quarter section of said lands is nondesert in character.

It is further understood and agreed that as soon as any of said lands may be irrigated and reclaimed as thoroughly as is now required of citizens who enter lands under the desert land law, and are occupied by actual bona fide settlers who have cultivated 20 acres of the tracts upon which they have settled, the said State, or its assigns, may make proof thereof under and according to such rules and regulations

as may be prescribed therefor by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory, patents shall issue to said State, or to its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing, and any surplus then remaining after the payment of the cost of such reclamation shall be held as a trust fund to be applied under the directions of the Secretary of the Interior to the reclamation of other desert lands within said State.

The said second party agrees that an accurate account shall be kept of all moneys received by said State from the sale of said lands, and of the money expended by it in the reclamation thereof, and shall from time to time render an accurate statement thereof to the Secretary of the Interior whenever required by him so to do.

And it is further stipulated that as soon as said surplus shall have been ascertained, and the amount of said trust fund finally declared, it shall be deposited by the said State in some United States Depository, where it shall remain until it shall be withdrawn for the purpose of reclaiming other lands, as hereinbefore provided.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioner of the General Land Office, and the other shall be placed of record and remain on file with the proper officer of the State, and it shall be the duty of said State to cause a copy thereof, together with a copy of all rules and regulations issued thereunder or under said act of Congress, to be spread upon the deed records of each of the counties in said State in which any of said lands shall be situated.

In testimony whereof, the said parties have hereunto set their hands, the day and year first herein written.

_____,
Secretary of the Interior.

State of _____.

By _____.

APPROVAL. *

To all to whom these presents shall come, greeting:

Know ye, that I, _____, President of the United States of America, do hereby approve and ratify the attached contract and agreement, made and entered into on the _____ day of _____, 189—, by and between _____, Secretary of the Interior, for and on behalf of the United States, and _____, for and on behalf of the State of _____, under section 4 of the act of Congress approved August 18, 1894.

_____,
President of the United States.

OKLAHOMA LANDS—CHEROKEE OUTLET—SETTLEMENT RIGHTS.

CAGLE v. MENDENHALL.

Invermiled
23 L. D. 533
The action of the Department in forbidding persons from making the run into the lands of the Cherokee Outlet, on the day of the opening thereof, from any of the Indian reservations on the eastern boundary of said lands, is not inconsistent with the statute authorizing the disposal of said lands, and one who violates said order is disqualified thereby as a settler.

Secretary Smith to the Commissioner of the General Land Office, May 16,
(J. I. H.) 1895. (J. L. McC.)

I have considered the case of *Byron E. Cagle v. W. J. Mendenhall*, arising upon the appeal of Mendenhall from the decision of your office, dated February 5, 1895, holding for cancellation his homestead entry for the NW. $\frac{1}{4}$ of Sec. 22, T. 23 N., R. 1 W., Perry land district, Oklahoma.

The controlling question in the case is, whether or not the contestant, Cagle, was disqualified because of his having entered the Territory from the west line of the Otoe and Missouri Indian reservation.

Prior to the opening of said territory by proclamation of the President, the Department, in answer to inquiries as to whether settlers would be permitted to enter the strip from any of the Indian reservations on the eastern side of the territory, informed them that the run could not be made from any of those reservations, and instructions were issued to remove all persons from the hundred foot strip on the eastern boundary. This was the construction placed by the Department on the proclamation of the President prescribing rules and regulations for the occupation of said lands.

The question was referred by this Department to the Assistant Attorney General, for an opinion as to whether, under the President's proclamation, settlers would be permitted to make the run from the Osage and Ponca reservations. On August 28, 1893, he submitted an opinion to the effect that, in view of the treaty between the United States and the Cherokee Indians, prohibiting persons from entering the Indian Territory for any purpose except those specified in the treaty, or by express provision of the United States, all persons were prohibited from going upon those reservations for the purpose of making what is called "the run" into the Cherokee Outlet on the day of the opening, and that it was the duty of the Department to take such measures as would effectually prevent any such trespass on the part of those who expected to enter the "Outlet" for the purpose of making such settlement. This opinion was approved by the Department, and notices were sent by the Department stating that settlers would not be allowed to make the run for claims from the Osage and Ponca reservations. (See letter to Harding & Riddell, Arkansas City, Kansas, dated August 28, 1893.)

On September 4, 1893, the special agent charged with the general supervision of opening the Cherokee outlet requested to be advised whether persons would have the right to make the run from the eastern border of the tract; and on September 5, 1893, he was instructed that they could not.

These instructions were communicated to the officers of the army and of the land department charged with the duty of enforcing the rules and regulations governing the occupation, and were by them given general publicity.

After a careful consideration of the questions presented in this case, I am satisfied that the action of the Department in forbidding persons from making the run from any of the reservations on the eastern border of the "Outlet" was not inconsistent with the act of Congress; and it being generally known that such instructions had been issued, settlers who acted in obedience thereto should not be defeated in their rights by others who, as a matter of fact, obtained advantage over them by making the run from adjacent Indian reservations.

The decision of your office holding Mendenhall's homestead entry for cancellation was erroneous. It is therefore hereby reversed.

PENSACOLA AND LOUISVILLE R. R. CO.

Motion for review of departmental decision of December 5, 1894, 19 L. D., 386, denied by Secretary Smith, May 16, 1895.

ADDITIONAL HOMESTEAD ENTRY—APPROXIMATION.

FRANK A. TAFT.

In determining the acreage that may be taken as an additional homestead entry under the act of March 2, 1889, the rule of approximation is properly applicable.

Secretary Smith to the Commissioner of the General Land Office, May 16, 1895. (C. W. P.)

I have considered the case of Frank A. Taft on his appeal from your office decision of January 18, 1894, affirming the judgment of the register and receiver at Kingfisher, Oklahoma, rejecting his application to enter lot 4 of section 6, T. 17 N., R. 7 W., Kingfisher land district, Oklahoma, but allowing him to enter the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and lot 5 of said section, containing 119.45 acres.

It appears from the record that Taft had previously made homestead entry of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 14, T. 18 S., R. 20 E., in the State of Kansas, containing forty acres, for which patent issued August 20, 1885. Taft's additional entry was allowed under the provisions of the act of March 2, 1889. (25 Stat., 854.)

Taft's entry, as it now stands, contains a little more than half an acre under the one hundred and twenty acres to which under the law he is entitled, and lot 4 contains 25.90 acres, to allow which would make an excess in his entry of 25.45 acres.

I agree with you that the action of the local officers in refusing to allow the entry of lot 4 is correct, and your decision is affirmed.

SANDERS v. PARKER.

Motion for the review of departmental decision of December 24, 1894, 19 L. D., 584, denied by Secretary Smith, May 16, 1895.

DESERT LAND ENTRY—FINAL PROOF—PARTIAL RECLAMATION.

RIDER v. ATWATER.

Proof of reclamation submitted on a desert land entry must show that the claimant is in possession of a permanent water supply sufficient to effect reclamation. When the proof submitted shows reclamation as to a part of the land entered, and failure to effect proper irrigation of the remainder, the entry may be approved as to the tracts reclaimed, and canceled as to the remainder.

Secretary Smith to the Commissioner of the General Land Office, May 16, 1895. (F. W. C.)

I have considered the appeal of Ella V. Atwater from your office decision of February 2, 1894, rejecting her final proof offered under desert land entry No. 2216, made June 11, 1890, covering the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, of Sec. 22, T. 7 N., R. 14 W., Helena land district, Montana, and holding for cancellation said desert land entry.

On March 29, 1893, claimant gave notice of her intention to make final proof on the 13th of May, 1893. She appeared at the appointed time and place named in the notice and submitted her proof, when she was met by Demosthenes Rider who protested against the acceptance of said final proof on the ground that claimant does not own or control, or have a clear right to the use of a supply of water to irrigate the land embraced in her entry, and that said land, except about ten acres in the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, is unreclaimed.

Claimant and her witnesses to her final proof were cross-examined and witnesses were introduced on both sides.

Upon the record thus made the local officers in their decision rendered July 13, 1893, recommended the cancellation of claimant's entry.

Upon appeal your office decision of February 2, 1894, sustained the local office, rejected claimant's proof, and held her entry for cancellation, from which action she has appealed to this Department.

The testimony shows that for the reclamation of this land claimant depended upon water conducted through three ditches. Ditch No. 1 is a branch or continuation of a ditch which taps Flint Creek some distance south of this claim. This ditch is known as the Atwater and Schoonover ditch, in which claimant holds a one-third interest, through transfer from Atwater and Schoonover, which would entitle her to about one hundred and fifty inches of water. This ditch meets the land in question near the boundary line between the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and, according to the preponderance of the

testimony, is capable of reclaiming in the neighborhood of seventy acres. A small patch of ten acres or more, part of which lies in each of the subdivisions just named, has heretofore been reclaimed and alfalfa is growing thereon. It is through this ditch that the only permanent water supply can be had so far as the preponderance of the testimony shows. The other ditches, Nos. 2 and 3, are fed from melting snow and springs and the water supply derived therefrom can not be considered of such character as could be depended upon for reclamation of the land during the irrigating season.

It appears that on May 13, when claimant offered her final proof, the irrigating ditches had not been completed to each of the subdivisions of the land, but before the conclusion of the hearing the ditches had been extended to each forty acres of the land in question.

As a whole, it can not be said that such reclamation has been shown as will satisfy the statute, claimant not being shown to be in possession of sufficient water supply, permanent in character, to make reclamation of the land possible, but it would seem from a preponderance of the testimony that from ditch No. 1, sufficient water, permanent in character, could be had to reclaim the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of sec. 22, the two tracts lying directly under said ditch; and I am of the opinion that as to said tracts the proof should be accepted and the entry canceled as to the remaining lands covered thereby.

The local officers in their decision suggest that claimant is not seeking to obtain title for her own benefit but rather for the benefit of her husband who, it appears, prior to making the entry in question had made a desert entry of the land under consideration and the entry in question was made on the day that he relinquished; further, that the only permanent water supply is acquired through him, the transfer of which recites a mere nominal consideration, but from a review of the case I do not find such evidence as would warrant the holding that the entry was made otherwise than for the benefit of the claimant.

Your office decision is accordingly modified.

JENKINS ET AL. *v.* DREYFUS.

Motion for review of departmental decision of October 10, 1894, 19 L. D., 272, denied by Secretary Smith May 16, 1895.

PLAT OF SURVEY—TIMBER LAND ENTRY—CONTIGUITY OF TRACTS.

FRANCIS GORMLEY.

A decision of the General Land Office, based on the plat of survey in said office, holding certain tracts of land to be non-contiguous, must be treated as conclusive of the fact so found, in the absence of evidence showing error in said plat. An entry of timber and stone land under the act of June 3, 1878, can not be allowed to embrace non-contiguous tracts of land.

Secretary Smith to the Commissioner of the General Land Office, May 16, 1895.
(C. J. W.)

On October 21, 1893, Francis Gormley made his sworn statement and application to file stone and timber entry, under act of June 3, 1878, as amended by the act of August 4, 1892, on lots 1 and 2 of Sec. 9, and lots 2, 3, and 4 and NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, in T. 61 N., R. 24 W., 4th p. m., and on same day said application was rejected by the register and receiver at Duluth, Minnesota, because of non-contiguity of tracts applied for.

On November 20, 1893, appeal from decision of the local officers to your office was filed and on February 17, 1894, your office decision was rendered affirming the decision of the local officers rejecting said application and for the same reason given by them. On 16th of April, 1894, appeal was filed from your office decision to this Department.

The errors alleged to have been committed in your office decision are specified as follows:

1st. In holding that the tracts applied for are non-contiguous, the field notes and general plats showing that the same are contiguous, and the same being in fact contiguous.

2d. In holding that the said tracts though non-contiguous can not be taken in the same timber and stone application.

No evidence accompanies the appeal. The first ground of error relates purely to a question of fact. In your office decision referring to this disputed question of fact you say:

The plat in this office shows that lots 2 and 3 of Sec. 10, T. 61 N., R. 24 W., 4th p. m., are not contiguous, the east line of lot 2 terminating with the NW. corner of lot 3, of said section, the west line of the lot being a meandered line of a lake situated in sections 9 and 10.

This will be taken as conclusive of the question of fact involved in the first ground, in the absence of evidence showing error in the plat.

The only remaining question is one of law, which is in substance that non-contiguity is no legal obstacle to entry under the stone and timber acts. The principal authority cited by counsel for appellant in support of this proposition, is a letter from Commissioner McFarland to the register and receiver of Shasta, California, dated November 25, 1882 (2 L. D., 332). The proviso to the second section of the act of June 3, 1878 (20 Stat., 89), closes with this general clause:

Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Neither the act of June 3, 1878, nor the act of August 4, 1892, amendatory thereof, makes any reference to the contiguity or non-contiguity of the lands authorized to be entered.

Evidently the proviso above quoted (if such power did not otherwise belong to him) clothed the Commissioner with the power in prescribing regulations to carry the provisions of the act into effect, to

determine whether or not the lands allowed to be entered, should be contiguous, the act itself being silent on that question.

At least as early as March, 1886, this power was exercised (13 C. L. O., 35). Whatever may have been the earlier practice as to requiring entries of the character under consideration to be of contiguous lands, certainly at the time appellant's application was made and rejected, the rule of contiguity was of force.

Under general rules applicable to different classes of entries, Circular of the General Land Office, issued February 6, 1892, page 65, rule 24, is in point, and is in this language:

Entries of public lands, if surveyed, must be made by legal subdivisions according to the public surveys, and if different tracts are taken to make up the full quantity allowed or intended to be entered in pre-emption, homestead, timber culture and other classes of entries, the tracts must be contiguous to each other, so as to form one body of land.

Your office decision, affirming that of the local officers, is approved.

TURNER *v.* SOUTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of January 3, 1893, 16 L. D., 3, denied by Secretary Smith, May 16, 1895.

SETTLEMENT ON RESERVED LAND—CONFLICTING SETTLEMENT RIGHTS.

HUNTER *v.* BLODGETT.

Settlement on land covered by the entry of another confers no right against either the government or the entryman, but as between two settlers on land thus reserved, the settlement first in point of time is entitled to the highest consideration, in the event of the subsequent cancellation of said entry.

An act of settlement should consist of some substantial and visible improvement, having the character of permanency, and showing an intent to appropriate the land. Setting stakes to mark the foundation of a house will not be considered an act of settlement, where the stakes are so small as to be scarcely visible, and hence do not serve as notice of a settlement claim.

Secretary Smith to the Commissioner of the General Land Office, May 16, 1895. (J. I. P.)

I have considered the appeal of Hattie Hunter, the plaintiff in the above entitled case, from your office decision of May 4, 1893, holding intact the homestead entry of William M. Blodgett, made June 3, 1891, for the SW. $\frac{1}{4}$ of Sec. 32, T. 9 S., R. 39 W., Oberlin, Kansas, land district, said entry being numbered 14,228.

The record shows that on March 8, 1886, one Andrew Schultie made homestead entry No. 8,224 for said tract; that on October 25, 1889, one J. A. Carlson initiated a contest against Schultie's entry, charging

abandonment; that a trial was had December 5, 1889, the result of which was that the local officers recommended the cancellation of Schultie's entry, from which holding he appealed to your office.

While that appeal was pending in your office, Blodgett, with his father, so they testify, went on the tract in question on Sunday morning, April 12, 1891, and commenced settlement by sticking four small stakes in the ground as a site for a house twelve by sixteen feet. These stakes were of pine, about seven-eighths of an inch thick and two inches wide, and protruded about six inches above ground. On the 15th of April he hauled some lumber on the tract and commenced building a house twelve by sixteen feet, at or near where the stakes had been driven, and completed it on the 16th. He established his residence there at that time, and has continued to reside there since. There were about sixteen acres of breaking made by Schultie, fifteen acres of which Blodgett cultivated to grain, and the other he has in garden, all his improvements being valued at \$100.

The evidence shows that Hattie Hunter went on the land April 14, 1891, and excavated a place ten feet square and fifteen inches deep as the beginning of a sod house; that with the assistance of others, on the 15th and 16th of said month, she completed her sod house, and established her residence there, and that her home had been there and her residence maintained, save when she was away working for others, for the purpose of earning a livelihood and money wherewith to improve her claim. It is shown that when the house was completed there was a place for a door and a window; that the door was there, but was not hung nor a window placed at the opening until some time after. Notwithstanding that fact, however, her residence in that house, since she established it there, as above stated, is shown, I think, by a fair preponderance of the evidence. In fact, your office decision contains the statement that she "adduced evidence to the effect that she had maintained a residence thereon subsequent to April 16, 1891." The value of her sod house is estimated at \$25.

On April 21, 1891, while Schultie's appeal was still pending, Blodgett filed a second contest against his entry. On April 26 or 27, so he testifies, he purchased Schultie's relinquishment. On May 22, 1891, Hattie Hunter filed a third contest against Schultie's entry. On June 3, 1891, Blodgett filed Schultie's relinquishment in the local office and at once made entry. June 26, 1891, your office affirmed the decision of the local office, holding Schultie's entry for cancellation, and awarding the preference right of entry to Carlson. June 30, 1891, Hattie Hunter filed her affidavit of contest against Blodgett's entry, alleging priority of settlement, which, she avers, was made by her on said tract April 14, 1891.

July 20, 1891, Carlson was notified by the local office of his preference right of entry for thirty days. He failed, however, to exercise his right within the time allotted, and your office decision holds, I think correctly, that it must be considered as waived.

These are the facts as shown by the record, in the order of their occurrence.

As the tract in question was covered by Schultie's entry at the time both Blodgett and Hunter made their settlements, they acquired no rights thereby as against him or the government; yet, as between themselves, the settlement made first in point of time is entitled to the highest consideration. (*Stone v. Cowles*, on review, 14 L. D., 90.)

Was the placing of the stakes on said tract by Blodgett on Sunday, April 12, 1891, as stated, to indicate the site for a house, such an act of settlement within the meaning of the law as would entitle him to priority?

The rule is, that to constitute settlement the settler must go on the tract claimed and do some act connecting himself with said tract, and the act must be equivalent to an announcement of intention to claim the land from which the public generally may have notice of the claim. (*Samuel M. Frank*, 2 L. D., 628; *Fuller v. Clibon*, 15 L. D., 231.) It must consist of some substantial and *visible* improvement, having the character of permanency, with intent to appropriate the land. (*Howden v. Piper*, 3 L. D., 162, at page 163.)

I submit that stakes of the size used by Blodgett can not be regarded as a substantial improvement, when they were hardly visible. There is no evidence that they were ever seen by any one after they were placed there. They were placed, so Blodgett and his father swear, within twenty rods of the north line and ten rods of the west line of said tract. On Sunday, with her brother, the contestant was along the road, which runs along the west line, after the time when the stakes are alleged to have been placed, as stated, and talked of her intention to settle on that tract. They both looked over the land, but saw no stakes. Again, on the evening of the 13th, the contestant was where she had a complete view of the tract—where she could have seen any evidence of a substantial settlement—but she did not see the stakes. On Sunday afternoon another witness of contestant herded cattle on the tract near where the stakes were alleged to have been placed. He stopped his horse within ten feet of the spot, and looked carefully over the land, but did not see the stakes. This negative evidence does not prove that the stakes were not there, but it does show, I think, that they were so unsubstantial in character, and so difficult to distinguish, that the public in general, and Hunter in particular, could not have had notice therefrom of an intention to claim the land.

In the case of *Fuller v. Clibon*, *supra*, reference is made to a number of instances where the Department has held that certain acts do not constitute settlement within the meaning of the law, and none of these acts, in my judgment, had less merit than the one under discussion.

When the defendant went on the tract on the 15th with his lumber to erect his house, and commenced its erection, he performed his first act of settlement which gave notice to the world that he claimed that

tract, and he found on his arrival there that the plaintiff had already preceded him and had performed an act of settlement which was sufficient to give notice to the world and put any one seeking to acquire the tract on notice. Hence I am of the opinion that the plaintiff's act of settlement was prior to that of the defendant.

It will be conceded that the improvements of the defendant are of greater value than those of the plaintiff, and that he has resided more continuously on the tract than she. But as both parties have acted in good faith, the value of the improvements cuts no figure in this case. (*Howden v. Piper, supra*, at page 163.) Indeed, if that were made the basis of good faith, the poorer settler would have no show whatever with one of ample means. The fact that the defendant's occupancy of the tract was more continuous than the plaintiff's does not defeat her rights in this instance, because the Department has held in a number of cases that when residence is once established, absences because of poverty, to obtain money wherewith to live and improve the tract, does not destroy the continuity of residence. (See *Logan v. Gunn*, 13 L. D., 113, and authorities there cited.)

For the reasons herein given, your office decision is reversed and the tract awarded to the plaintiff, with instructions to cancel the homestead entry of the defendant.

MINING CLAIM—PLACER LOCATION—EXPENDITURE.

CLARK *v.* TAYLOR.

The fact that a part of the work required by law on a placer claim is performed prior to the location of the claim, and while said claim is held as agricultural land, does not call for the cancellation of the entry, where the full amount of work required by law is performed prior to entry, and good faith is apparent, and no adverse claim exists.

Secretary Smith to the Commissioner of the General Land Office, May 16, 1895. (J. I. P.)

By letter "N" of April 5, 1894, your office transmitted here the appeal of Edwin Taylor from its decision of November 27, 1893, holding his mineral entry No. 1307, Sacramento, California, land district, for cancellation.

The tract embraced in said entry is the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 26, T. 6 N., R. 13 E., M. D. M., and is known as the Taylor Placer, and was located October 23, 1888.

January 17, 1889, Taylor filed mineral application No. 1729 for said claim, and after giving due notice thereof by publication, for the statutory period, and proceeding in all other matters in relation thereof as required by law, mineral entry No. 1307 was issued to him April 19, 1889.

June 4, 1891, a hearing was ordered by your office, on the corroborated protest of Warren V. Clark, alleging—(1) that said tract was more

valuable for municipal than for mining purposes; and (2) that claimant had not complied with the law in the matter of expenditures upon the claim.

At the hearing before the local officers, August 26, 1891, the first allegation was abandoned, and the evidence of protestant directed wholly to the second.

March 16, 1892, the local officers found in favor of the protestant, but upon a proper application duly made by claimant, a rehearing was ordered in said matter, before the local office, for January 16, 1893.

At that time the parties appeared. The protestant appeared specially, and objected to said rehearing. Said objection being overruled, the claimant introduced his testimony the protestant introduced none. May 15, 1893, the local office decided in favor of the claimant; that he had complied with the law in the matter of said expenditures.

From that decision the protestant did not appeal. Hence the decision of the local office, under Rule 48, Rules of Practice, is considered final as to the facts in the case, and should not be disturbed by your office unless for one of the four grounds specified therein. The first, third and fourth grounds do not exist, and unless said decision is "contrary to existing laws and regulations," it should not be disturbed.

Your office, however, in the decision appealed from, reversed the decision of the local officers, evidently on the "second" ground specified in Rule 48, *supra*, said decision, in effect, holding that the work done by claimant on said tract prior to its location, as a mining claim, could not be considered as having been done for the development of said claim as subsequently located, and that between the date of its location and entry only \$380 worth of work had been done thereon.

Section 2325, Revised Statutes of the United States, or so much thereof as controls and applies to this case, provides as follows—

The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

The facts found by the local officers, which are to be considered as final, are as follows—

An examination of the former evidence shows that the allegations of the contestant were largely dependent for substantiation upon his own evidence and the statement he made, connecting two Chinamen with the work done on the claim, and an

affidavit corroborative thereof, purporting to have been made by said Chinamen, and his own evidence as to the payments made by him for the work so performed.

The supplemental evidence of the respondent shows that the work done by said Chinamen was under an agreement with them, made by himself, and that the payments therefor were made by himself, and that in denial of the assertion of the contestant that he owned the land, the respondent produced and filed a bill of sale, showing himself to have become the owner by purchase from the contestant of a portion thereof which is identified by the evidence to be a portion of the land in controversy.

The respondent produced as a witness one of the Chinamen referred to as having been engaged in mining on this land, and one of them whom, it was alleged had made the affidavit referred to, viz: Ah Sin, he testified that the work done by himself and Ah Look his colleague in the work, and whom it was alleged had signed the affidavit referred to, was done under the agreement with the respondent. He testifies also that he never signed any paper, and did no work for the contestant.

As it appears from the evidence of contestant in the present record, that he had conducted mining operations on the land and had washed off about one-fourth of the tract, and apparently had sold to the respondent a portion of the land, and had since asserted no claim to any portion of it, thus as the respondent was his grantor (grantee), he was entitled to the benefit of the amount of labor so expended; aside from this however, it is shown that the work done by Freeman *et al.* amounted from one hundred and fifty to two hundred dollars and that the amount of the cost to the respondent of the work done by the Chinamen exceeded six hundred dollars.

The certified copy of the report of the U. S. Deputy Surveyor, filed, shows that more than five hundred dollars had been expended in labor prior to the entry made by the respondent.

It would appear from the above that the claimant and his grantor had expended more than \$500 on this claim prior to entry.

The distinction drawn in your decision, however, between mining work done on this tract, before its location as a mining claim, and after, is, in my judgment, more technical than is warranted under the circumstances. There is no adverse claim here, pressing for recognition. The only parties to this controversy are the government and this claimant, and under the circumstances, good faith having been shown, the Department should not cancel said entry, unless fraud is shown, or absolute failure to comply with the law, on the part of the claimant. (See *United States v. Charles S. Percival*, decided by this Department October 18, 1890.)

After entry where there is no evidence of fraud, and in a question between the government and applicant only, it is the duty of the Department to sustain the entry if it can be done without a violation of the law (*Maid of Erin*, 2 L. D., 742).

The claimant has been in the lawful possession of this tract for more than twenty years. It was originally included in his homestead entry, and was on September 1, 1883, on consideration of his final proof, held by the Department to be mineral in character, and excluded from his homestead. No adverse claim having attached thereto, and in consideration of the mining work already done thereon, and of the fact that most of his improvements were on said tract, he at once proceeded, in October following the decision of the Department, above mentioned, to take the steps necessary to acquire title thereto under the mining laws

of the United States with the results above stated. His absolute good faith is unquestioned. The fact that the amount of work required by law has been done by him and his grantors on the tract embraced in his placer claim prior to entry cannot be disputed. And in the absence of any adverse claim, and in view of all the facts and circumstances in the case, I am of the opinion that the entry should be held intact, and I so hold.

The decision of your office is therefore reversed.

MINING CLAIM—DISCOVERY SHAFT.

EDWARD W. WILLIAMS ET AL.

A mineral entry cannot be allowed upon a discovery of a lode within the limits of a prior patented lode claim.

Secretary Smith to the Commissioner of the General Land Office, May 16, 1895. (J. I. P.)

By your office letter "N" of April 15, 1894, you transmitted to this Department the appeal of Edward W. Williams *et al.* from your office decision of February 8, 1894, rejecting their mineral application No. 4451 for patent for the Bushwhacker, Fontaine, Formosa and Tee Gee Aitch lode claims, Central City, Colorado, land district.

The action of your office was upon the ground that the discovery of the Bushwhacker lode, located in 1891, is within the patented limits of the Frontenac lode, embraced in mineral entry No. 885, patented April 8, 1879.

The grounds upon which the appeal here is urged is that the Frontenac lode mining claim, with which, as stated, said Bushwhacker lode conflicts, was itself an invalid claim from the beginning, because the location shaft of the same was located within the lines of the Clifton mining claim, a valid and subsisting mineral location at the date of the application for patent on the Frontenac lode claim.

Whatever the records of the local land office, at the date when application was made for patent for the Frontenac lode claim, may have shown with reference to the territory embraced therein, it is evident that the subsequent issuance of patent therefor, deprives this Department of any jurisdiction over the territory within the patented limits of said claim.

Your office decision also allowed claimants the privilege of showing that mineral had been discovered upon that portion of the Bushwhacker lode outside of the limits of the Frontenac claim.

By your office letter "N" of November 17, 1894, you forwarded, obviously for my information, the affidavits of Joseph Shinneman, Samuel A. Rank and Charles S. Harker, purporting to show that fact.

The decision of your office is hereby affirmed, and the said affidavits of Shinneman, Rank and Harker, together with the application for a hearing filed by appellants, are herewith returned for appropriate action by your office.

RAILROAD LANDS—FORFEITURE ACT—SOLDIERS' DECLARATORY STATEMENT.

WICKSTROM v. CALKINS ET AL.

An applicant for the preferred right of entry accorded bona fide settlers under section 2, act of September 29, 1890, who fails to appeal from the rejection of his application, loses thereby whatever rights he may have been entitled to under said act; and it therefore follows that the heir of such an applicant can have no rights in the premises based upon the settlement of the deceased applicant.

The law authorizing the filing of a soldiers' homestead declaratory statement does not warrant the rejection of a filing on the ground that it was received through the mails.

Secretary Smith to the Commissioner of the General Land Office, May 16, 1895. (A. E.)

The record of this cause shows that on February 23, 1891, the district land office at Ashland, Wisconsin, received the soldier's declaratory statement of Ira Calkins for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 29, Tp. 49 N., R. 9 W., and of Edward A. Ross for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, same section. Said applications were allowed and made of record. The land was within the grant to the Wisconsin Central, forfeited by the act of September 29, 1890, and opened to entry on February 23, 1891. On the same date an application was received from one Jonas Wickstrom to make homestead entry of the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, same section, which was rejected because of the claims of Calkins and Ross.

On August 27, 1892, John Wickstrom, claiming to be brother of Jonas Wickstrom, deceased, who made application during his lifetime, as above stated, filed a contest against the entries of Calkins and Ross as lawful heir of said Jonas Wickstrom, and therefore entitled to the preference right extended to said Jonas Wickstrom by the act of September 29, 1890. In this contest affidavit Wickstrom stated that deceased had declared his intention to become a citizen of the United States, and was otherwise qualified to make entry of said land; that he had continued the cultivation of said land begun by said deceased on September 2, 1890, and maintained until April 1, 1892, the time of his death; that affiant was the only heir of said Jonas Wickstrom, deceased, residing in the United States; that he had declared his intention to become a citizen and was otherwise qualified.

After a hearing on November 15, 1892, the local office on January 13, 1893, found that the heirs at law of Jonas Wickstrom were entitled to enter the west half of the northeast quarter of section 29; that the soldier's declaratory statement of Calkins for the northwest of the northeast should be cancelled and his homestead application rejected so far as it relates to that forty; that the declaratory statement of Ross should be cancelled so far as it relates to the southwest of the northeast and his homestead application rejected as to that forty, and that he should be allowed to enter the west half of the southeast quarter of said section.

From this all parties appealed, and on July 28, 1893, your office, after holding that the declaratory statement of Calkins and Ross not being filed in person could not be recognized, further held that:

As the filings of Calkins and Ross cannot be considered, they must rely upon their homestead applications, and prior to this time Wickstrom had asserted his claim under his settlement by affidavit of contest, and consequently had the superior right of entry.

On this finding it was decided "that the plaintiff has the superior right of entry for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the land claimed, and therefore so much of the land included in Calkins's filing as embraces the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and so much of Ross's filing as embraces the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ are held for cancellation, and your decision is accordingly modified."

From this Calkins appealed.

The land in controversy in this case is within the primary limits of the grant to the Portage, Winnebago and Superior Railroad Company, between Bayfield and Superior, which afterwards passed to the Wisconsin Central Railroad Company.

This land was withdrawn for the benefit of said grant from all settlement and entry on December 10, 1869, and it remained withdrawn and not subject to any of the public land laws, until September 29, 1890. During that period of withdrawal all persons who went upon said land were trespassers, and no valid right could grow from such trespass.

On September 29, 1890 (26 Stat., 496), the act of Congress was approved which provided for the forfeiture of all lands granted to aid in the construction of railroads because of failure to perform the conditions contained in said grant. Among others, the Wisconsin Central had neglected to construct that portion of its road between Bayfield and Superior for which lands were granted by the act of May 5, 1864, and that portion of its grant was forfeited.

The second section of the forfeiture act of September 29, 1890, provides:

That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited, and are otherwise qualified, on making due claim on said land under the homestead law within six months after the passage of this act, shall be entitled to a preference right to any of the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation, etc.

The object of this provision was to protect actual bona fide settlers who had settled within the limits of railroad grants for the purpose of subsequently acquiring the lands from the railroad company, and also to protect innocent persons who in ignorance of the law had made settlements upon said lands though such settlement was none other than a trespass in both cases.

In the case under consideration, Jonas Wickstrom, the deceased settler, was entitled to this privilege by reason of his being an actual settler upon the land at the date the act was passed. When the local office rejected his application, the proper method for him to have pursued was to have appealed from said rejection. Whatever rights Jonas Wickstrom may have acquired under the act of September 29, 1890, by virtue of his settlement they were lost by his failure to appeal from the decision of the local office rejecting his application to enter the land. It therefore follows that John Wickstrom, as heir, can have no rights in the premises based upon that settlement.

Your office held that the declaratory statements of Calkins and Ross were void because filed by mail. This holding was based on a certain circular (20 L. D., 7), dated April 13, 1892, and a letter from the Commissioner of the General Land Office to registers and receivers, dated April 14, 1874 (1 Copp's L. O., 20). This letter states that all homestead applications must in all cases be filed by soldiers in person, or by their duly authorized agents, and that they should be rejected when received by mail. The circular was based on this letter.

It is quite evident that both the letter and spirit of the law were misunderstood when this doctrine was laid down. The letter of April 14, 1874, was written before the Revised Statutes went into effect and the circular afterwards, but as the wording of the act of April 4, 1872, (17 Stat., 49), which first gave the soldiers or sailors the privilege of filing a declaratory statement six months before making entry, was not changed in the Revision, it is not necessary to make any distinction because of the difference in time between the issuing of the letter and the circular referred to. Section 2304 allows the soldier or sailor after filing the declaratory statement six months within which to make his entry. Section 2309 allows said declaratory statement to be filed by agent, but requires that within six months the soldier or sailor must make actual entry of the land in person.

The intention of Congress in giving this six months preference right after filing declaratory statement was to give the soldier or sailor sufficient time within which to prepare to make his actual entry and settlement. The reason for allowing the statement to be filed by agent was that the soldier or sailor might be enabled to hold the land without being compelled to go in person to the land office until he was ready to begin actual residence.

It is quite evident that if Congress intended that the soldier or sailor might hold the land by having this declaratory statement filed

by an agent, he could do so through the agency of the post office department. By sending the statement by mail there was less evidence of any attempt at bad faith or speculation on the part of the soldier than in filing through an agent, and the objection to this method of filing does not appear to be founded upon any reason.

From what has been said, it is plain that the interpretation put upon this act by your office and the circular of April 13, 1892, is incorrect, and that your office holding in this case should be set aside.

Your office decision is reversed, and the entries of Calkins and Ross will be allowed, subject to the rights of John Wilson, in the case of *Wilson v. Calkins and Ross*, this day decided.

INDIAN LANDS—OCCUPANCY FOR MISSION PURPOSES.

A. J. GLORIEUX.

Under the provisions of the act of February 8, 1887, the Secretary of the Interior may confirm the occupancy of land for religious or educational work among the Indians, whenever in his opinion such action is for the welfare of the Indians, and the lands are of the class subject to allotment. If such occupancy subsequently appears to not be to the interest of the Indians, the Secretary may direct its discontinuance.

Assistant Attorney-General Hall to the Secretary of the Interior, May 19, 1895.

I am in receipt, by reference of Acting Secretary Reynolds, of the application of Rev. A. J. Glorieux, Catholic Bishop of Boise, Idaho, asking that the occupancy of a tract of one hundred and sixty acres of land, located among the Kootenai Indians, in the Kootenai Valley, Idaho, for missionary purposes of the Roman Catholic church, be confirmed to said church under the provisions of the act of February 8, 1887 (24 Stat., 388).

The reference to me by Acting Secretary Reynolds asks "whether the act of February 8, 1887, applies to these lands."

The 4th section of the act of 1887 permits allotments by Indians on public lands of the United States upon which they reside, apart from their reservations, or for whose tribe no reservation is provided by treaty. That portion of the act which authorizes the confirmation of the occupancy, by religious societies or organizations, of the land occupied by them at date of said act, is as follows:

If any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be occupied, on such terms as he shall deem just.

It will be seen that confirmation of occupancy by religious or educational societies may be made of any lands which may be allotted to Indians under said act, i. e., any lands to which said act applies.

The history of occupancy of the lands in question by the Catholic church is briefly as follows:

In the year 1840, the Catholic church established a mission on these lands, and at some time thereafter erected a house and suitable buildings for the purpose of conducting religious exercises, and teaching schools, among the Indians. By the treaty of July 16, 1855 (12 Stat., 975, article 1), the confederated tribes of Kootenai Indians ceded the northern part of the State of Idaho, including the land upon which the said mission was located, to the United States. Thus these lands became public lands of the United States—the Indian title having been extinguished. A great many Indians continued to reside upon these public lands, and the Catholic church maintained its mission church and schoolhouse, and from time to time erected buildings thereon. My information, gleaned from the papers submitted to me, is that the lands occupied by the Catholic church are in the midst of quite a large Indian settlement. There can be no question, I think, that the Indians occupying that section of the State could take allotments in these lands, under the 4th section of the act of February 8, 1887. This being true, I do not doubt that the Secretary of the Interior is authorized to confirm the occupancy of said lands to the Catholic church, as prayed for by Bishop Glorieux.

You will note that the language of the act in reference to confirmation is, that the Secretary is "authorized" to confirm. I do not construe this language as mandatory; but the Secretary is vested with authority to make confirmation of lands occupied by religious organizations, if in his judgment it is deemed best for the well-being of the Indians. As to whether the occupancy of the Catholic church in this instance should be confirmed is a matter within the discretion of the Secretary, which should be exercised with a view to promoting the welfare of the Indians.

I call attention also to the fact that the church will not get title to these lands, should its occupancy of the land be confirmed by the Secretary. The only right given, is to have the use of the lands "so long as the same shall be occupied for religious and educational work among the Indians."

I am of the opinion that whenever it is made to appear to the Secretary that such religious or educational work is for the interest of the Indians, such occupancy may be continued; and when, in his judgment, it ceases to be necessary or profitable, he can discontinue it.

Approved,

HOKE SMITH,

Secretary.

RIGHT OF WAY—CANAL AND RESERVOIR.

SOUTH PLATTE AND RESERVOIR CO.

An application for right of way privileges under the act of March 3, 1891, can not be approved where it appears that the purpose of the proposed pipe line and reservoir is to afford an auxiliary to the waterworks of a city. The watering of gardens and lawns in a city, during the summer season, is not the irrigation contemplated by said act.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (F. W. C.)

I am in receipt of your office letter of April 19, 1895, again submitting for the consideration of the Department the maps and papers accompanying the application for right of way on account of canal and reservoir proposed to be built by the South Platte and Reservoir company in Colorado.

The matter of the application of this company was before considered in departmental decision of February 23, 1895 (20 L. D., 154), wherein it was held that the act of March 3, 1891 (26 Stat., 1095), under which the present right of way is claimed, restricted the purpose for which the right of way therein granted may be used to that of irrigation and that maps of location will not be approved where it appears that the right of way is desired for any other purpose than that of irrigation.

As it appeared that under the articles of incorporation this company was empowered to engage in other business than that of irrigation, and as it appeared from a letter filed by the company's attorney that the purpose for which the reservoir and pipe line in question was desired was that of furnishing water, in cases of emergency, to the water works company of the city of Denver, you were directed to call upon the company to file its certificate under the signature of its president and the seal of the company to the effect that the proposed reservoir and pipe line, on account of which the right of way is claimed in its application, is desired for the sole purpose of irrigation.

By your office letter of April 19, 1895, the papers are again forwarded with the certificate of the president to the following effect:

It is the purpose of this company to sell and furnish water for the irrigation of lands. It is also the purpose of this company to furnish and supply the water works company of the city of Denver with water for irrigation in the event hereinafter named. . . .

There never has been a time yet when the present water supply of the water works company of the city of Denver has not been sufficient to meet all the demands of the city of Denver, and it will always be sufficient to supply the domestic uses of water for said city; but in recent years great demands have been made upon the water works company of said city for water to be used for irrigating gardens and lawns in the city and vicinity thereof, and in the summer season most of the water taken through its pipes is used for this purpose. If that demand continues to grow, and there should happen to be a shortage of water in the river any one year, the irrigation of these gardens and lawns will have to be stopped unless this safety reservoir is used. There

being always ample water to supply the domestic uses of the city of Denver, its purpose is to supply the possible shortage made by the irrigation of gardens and lawns; hence the proposed reservoir and pipe-line on account of which the right of way is claimed, is desired for the sole purpose of irrigation.

From this certificate it would appear that the purpose of the construction of the proposed reservoir is as stated to be a safety reservoir that is auxiliary to the water works of the company engaged in supplying water to the city of Denver. The irrigation referred to, that of watering gardens and lawns during the summer season within the city, is not irrigation within the meaning of the act of March 3, 1891, *supra*.

Said act contemplates the reclamation of arid lands so that they may be capable of producing ordinary crops, and as the purpose for which the water desired to be conducted and stored under the application under consideration is not in my opinion for the purpose of irrigation, as contemplated by the statute, I must refuse to approve the maps submitted.

The maps are therefore herewith returned and you will advise the company accordingly.

RESERVATION—IMPROVEMENTS.

INSTRUCTIONS.

The Department will not consent to the erection of buildings on land reserved for government use, when such improvements may form the basis of a demand against the United States.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 18, 1895. (G. B. G.)

I have your letter of April 22, 1895, transmitting a report by Inspector Swineford, dated the 16th of April, 1895, on the condition of the building occupied by the United States Land Office at Kingfisher, Oklahoma Territory, which is located on the government acre reserved for such purpose. In said report, he says,

The office is located in a one-story frame building, erected by the government some years ago, on the one acre lot reserved for that purpose, and which is amply sufficient for all requirements of the public service; but the floor is likely to be submerged at almost any time, in case of a heavy rain, owing to the fact that it is several feet below the grade of the surrounding street, as established since it was built. It should be raised sufficiently to preclude damage by reason of such an accident. In this connection I submit herewith copy of a proposition recently made by a number of the most responsible business men and residents of Kingfisher to the Post Office Department, the original of which will be found on file in that Department, and respectfully recommend that, should permission to erect a practically fire-proof building on the land office acre for a post office be requested, it be promptly granted. Such a building will in nowise impair the safety of the land office, but on the other hand will effect a considerable saving to both Departments.

In your said letter you say,

I enclose also a copy of the proposition submitted by the citizens of Kingfisher to the Hon. First Assistant Postmaster General, requesting that they be permitted at

their own expense to construct a suitable building and furnish the same for the use of the post office, upon the said government acre and to convey the same in fee to the government and also to remove and raise to the proper grade the land office building on a stone foundation on said acre.

I have examined the terms of the agreement upon which it is proposed to erect said post office building and I nowhere find a stipulation of the parties to erect the same at their own expense. They specifically agree to remove the old land office building and raise it to its proper grade at their own expense, but if it is their intention to erect a post office building without expense to the government, they have carefully refrained from saying so. It is true they agree to lease or convey the building to the government, but they are silent as to terms, and the presumption is that the intention is to lease or convey the same for a consideration.

I have no authority to contract for the erection of public buildings in this informal way, and will not give the consent of this Department to the erection of such buildings on public lands where they may form the basis of a demand against the government.

NORTHERN PACIFIC R. R. CO. *v.* FLANNERY.

Motion for review of departmental decision of February 23, 1895, 20 L. D., 138, denied by Secretary Smith, May 18, 1895.

RAILROAD GRANT—CONSOLIDATION—MORTGAGE SALE.

DOERING *v.* UNION PACIFIC RY. CO.

The act of March 3, 1869, authorizing the Union Pacific Ry. Co., Eastern Division, to contract with the Denver Pacific company for the construction and operation of that part of its railroad between Denver and its point of connection with the Union Pacific at Cheyenne, is recognized in the Department and courts as authority for the consolidation of said lines of road.

The provision in section 3, act of July 1, 1862, incorporating the Union Pacific Railway company, to the effect that the lands granted, and remaining unsold after three years from the final completion of the road, should be subject to settlement and pre-emption, cannot be enforced as against a mortgage placed on said lands wherein the fee thereto is hypothecated by the company to secure the payment of a debt not yet due.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (F. W. C.)

I have considered the appeal of Conrad Doering from your office decision of January 24, 1894, denying his application to enter the NE $\frac{1}{4}$ of Sec. 3, T. 2 S., R. 68 W., Denver land district, Colorado, for conflict with the grant to the Union Pacific Railway company, successor to the Denver Pacific Railway and Telegraph company.

There appears to be no question that the land in question is a part of that granted to aid in the construction of said Denver Pacific Railway and Telegraph company, it being within the limits of the grant and free from adverse claim at the date of the definite location of the road, namely, August 20, 1869.

Doering's application was presented on February 9, 1891, and rejected for conflict with the grant, from which he appealed to your office and again from your office decision of January 24, 1894, to this Department.

His first contention is that the consolidation of the Kansas Pacific Railway and the Denver Pacific Railway and Telegraph company was in violation of the provisions of the act of Congress approved July 2, 1864 (13 Stat., 356) and that it was also prohibited by the constitution of Colorado, Art. XV., Sec. 5, and Sec. 318, page 187, General Laws of Colorado, 1887.

It is unnecessary to here recite the legislation relative to the several grants which were finally known as the Union Pacific Railway company, suffice it to say, that before the Union Pacific had completed its line to Denver, and on March 3, 1869, Congress passed an act (15 Stat., 324), authorizing the Union Pacific Railway company, Eastern division, to contract with the Denver Pacific Railway and Telegraph company, a Colorado corporation, for the construction, operation and maintenance of that part of its railroad and telegraph between Denver and its point of connection with the Union Pacific Railroad at Cheyenne. This consolidation has uniformly been recognized by this Department and the courts (See case of *U. S. v. Union Pacific Ry.* (148 U. S., 563)), and this ground of claimant's appeal is therefore overruled.

It is further urged in said appeal that by the terms of Sec. 3 of the act of July 1, 1862 (12 Stat., 489) incorporating the Union Pacific Railway company, provision is made that the lands remaining unsold after three years after final completion of the road, should be subject to settlement and pre-emption and that such condition attaches to all lands acquired by the Union Pacific Railway company either under its original charter or by reason of its consolidation with the Denver Pacific Railway and Telegraph company.

It is further urged that by the terms of a certain deed of trust alleged to have been executed on August 10, 1869, the Denver Pacific Railway and Telegraph company, deeded in trust to secure the bond holders of the company 800,000 acres of land situated within the limits of its grant between Denver, Colorado, and Cheyenne, Wyoming. That the aggregate area of lands within the grant of the Denver Pacific Railway and Telegraph company is 1,356,800 acres, so that said mortgage did not embrace all the lands within the grant for said company, and as the lands intended to be mortgaged are not particularly described, Doering claims the right to enter the land in question, as not being a part of that mortgaged, or sold, or otherwise disposed of within three years after building the road, and therefore subject to his application presented February 9, 1891.

He fails to furnish a copy of the deed or mortgage referred to, but from an abstract of title covering a portion of Sec. 15, T. 5 N., R. 65 W., Colorado, I find an abstract of the mortgage and deed of trust, executed by said Denver and Pacific Railway and Telegraph company, on August 10, 1869, from which it appears that the company conveyed by said mortgage

every alternate section of public land designated by odd numbers, to the amount of ten alternate sections per mile, and within the limits of twenty miles on each side of its said railroad, excepting lands sold, reserved or otherwise disposed of by the U. S. or to which a pre-emption or homestead claim may have attached at time of said road is definitely fixed and excepting mineral lands other than coal and iron.

This mortgage was to secure bonds issued in the sum of \$2,500,000, and would appear to be a blanket mortgage covering the entire land grant, and similar to those considered by the Supreme court of the United States in the case of *Platt v. Union Pacific Railway company* (99 U. S., 48), in which it was held that the mortgage was an hypothecation of the fee and not merely an estate determinable at the expiration of three years from completion of the road and as the debt it was given to secure had not matured, the lands were held to be not subject to pre-emption under the provisions of Sec. 3 of the act of July 2, *supra*.

From a careful review of the matter I find that no such showing has been made in support of the appeal as would warrant this office in disturbing the decision of your office which sustains the action of the local officers in rejecting Doering's application for conflict with the grant for said company and said decision is accordingly affirmed and Doering's application will stand rejected.

PRACTICE—APPEAL—PROCEEDINGS ON FINAL PROOF.

PATRICK FOX.

Where an entry is held for cancellation on the report of a special agent, subject to the right of the entryman to apply for a hearing to show cause why his entry should be sustained; the entryman may decline to apply for a hearing, and appeal to the Department for a consideration of his case as it stands on the record.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (J. I. P.)

By your office letter "P" of March 9, 1895, you transmitted here the application of Patrick Fox for a writ of certiorari respecting your office decision of February 2, 1895, denying his right of appeal from your office decision of September 20, 1894, holding for cancellation, subject to his right to apply for a hearing, his commuted homestead entry No. 7936, made June 27, 1891, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 42 N., R. 27 W., St. Cloud (Taylors Falls Series), Minnesota, land district.

The pertinent facts in this case are that on March 17, 1884, Fox made homestead entry No. 3334 for the SE. $\frac{1}{4}$ of the section, township and range above described.

June 27, 1891, his final proof was accepted, and he was allowed to commute his homestead entry to cash entry No. 7936 for the tracts embraced therein, as above stated.

September 20, 1894, your office, on the report of a special agent, with reference thereto, held said entry No. 7936 for cancellation, subject to Fox's right to apply for a hearing to show cause why said entry should be sustained.

Within the time required by the rules of practice, Fox filed his appeal from said decision in the local office, which by its letter of October 12, 1894, transmitted the same to your office.

February 2, 1895, your office, by its letter "P" of that date, formally decided that Fox had no right of appeal from its decision of September 20, 1894; that said decision was a mere interlocutory order, from which appeal did not lie; and so holding declined to entertain Fox's appeal.

Fox now applies, under rules 83 and 84, rules of practice, to have the proceedings certified here, and to suspend further action until the Department passes on the same.

In the case of W. W. Wishart (13 L. D., 211), the Department held that—

Under a decision of the Commissioner holding an entry for cancellation, with the right to furnish new or supplemental proof, the entryman may refuse to furnish such proof, and standing on his case as made, appeal to the Department; but if the appeal below is finally affirmed, the appellant will not be allowed to subsequently submit supplemental proof, citing the cases of W. B. Ennis et al. (5 L. D., 429), and James Hill (6 L. D., 605).

This, as I understand it, is the position of Fox. He insists that his final proof, made in 1891, with other evidence in the case, conclusively shows his good faith and compliance with the law; that lapse of time has scattered his witnesses to parts unknown, and that poverty and old age render it impossible for him to now ascertain their whereabouts, and obtain their evidence for a hearing, as directed by your office. Hence he stands on the case made by the record, declines to apply for a hearing to show cause why his entry should be sustained—for the reasons stated,—and appeals from your office decision holding his entry for cancellation. This, under the authorities, he clearly has a right to do.

You will therefore transmit the record in the case to this Department, and suspend further action with reference to said entry until the questions presented by said record are passed on.

KICKAPOO INDIAN LANDS OPENED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., May 18, 1895.

REGISTERS AND RECEIVERS,

Guthrie and Oklahoma, Oklahoma.

GENTLEMEN: I have to call your attention to the proclamation of the President, dated May 18th, 1895, together with the schedule of lands, copies of which are hereto attached,* by which the lands described in that schedule, except such as may be properly selected by the Territory of Oklahoma under and in accordance with the provisions of the act of March 2, 1895 (28 Stat., page 899) prior to the time fixed for the opening, will be open to settlement under the statutory provisions therein recited, at and after the hour of 12 o'clock noon, central standard time, of Thursday, the twenty-third day of May, 1895, being certain tracts embraced in the cession of the Kickapoo Indians, by agreement ratified and confirmed by the act of Congress approved March 3, 1893 (27 Stat., pages 557 to 563).

With regard to the lands described in the schedule, you will observe that the act referred to provides:

That whenever any of the lands, acquired by this agreement shall, by operation of law, or proclamation of the President, of the United States, be open to settlement or entry, they shall be disposed of (except sections sixteen and thirty-six in each township thereof) to actual settlers only under the provisions of the homestead and townsite laws (except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply): Provided, however, That each settler on said lands shall, before making a final proof and receiving a certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents an acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the sum to be paid as aforesaid. Until said lands are opened to settlement by proclamation of the President of the United States, no person shall be permitted to enter upon or occupy any of said lands; and any person violating this provision shall never be permitted to make entry of any of said lands or acquire any title thereto: Provided, That any person having attempted to, but for any cause failed to acquire a title in fee under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make homestead entry upon said lands.

It is further provided by the act of Congress approved February 10, 1894 (28 Stats., page 37):

That every homestead settler on the public lands on the left bank of the Deep Fork River in the former Iowa Reservation, in the Territory of Oklahoma, who

* Schedule not published herein.

entered less than one hundred and sixty acres of land, may enter, under the homestead laws, other lands adjoining the land embraced in his original entry when such additional lands become subject to entry, which additional entry shall not, with the lands originally entered, exceed in the aggregate one hundred and sixty acres: Provided, That where such adjoining entry is made residence shall not be required upon the lands so entered, but the residence and cultivation by the settler upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon the land embraced in his additional entry; but such lands so entered shall be paid for, conformable to the terms of the act acquiring the same and opening it to homestead entry.

It is also provided by the act of Congress approved March 2, 1895 (28 Stats., page 899):

That any State or Territory entitled to indemnity school lands or entitled to select lands for educational purposes under existing law may select such lands within the boundaries of any Indian reservation in such State or Territory from the surplus lands thereof, purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement.

In regard to homestead entries for these lands, you will proceed under the general instructions of the circular of July 21, 1890 (11 L. D., 79), and instructions therein referred to, and also the instructions of the circular of March 23, 1895 (20 L. D., 432), except as modified by these instructions.

Where a party, who has made or commuted a homestead entry prior to March 3, 1893, applies to make a second homestead entry under the second proviso to section 3 of the act of March 3, 1893, he will be required to file in addition to the other affidavits required, an affidavit, giving the description of the land embraced in his former entry, the date when and office where made, and if commuted, the date of commutation. If he has failed to perfect title to the land embraced in his former entry, he must also set forth the cause or causes which prevented him from acquiring title thereto, and his affidavit in the latter case should be corroborated by two parties if possible. If the showing made by the party is, in your judgment sufficient to entitle him to the benefits of the statute, you will allow him to make entry as in other cases.

You will notice that the act of February 10, 1894, provides for additional entries for lands in the Kickapoo reservation by homestead settlers on the left bank of the Deep Fork River, who entered less than one hundred and sixty acres. The area which may be embraced in such additional entries is limited to a quantity which, with the tract embraced in the original entry, shall not exceed one hundred and sixty acres, and the tract entered must adjoin that embraced in the original entry. No party will be entitled to an additional entry under said provision whose claim to the lands embraced in his original entry has been initiated since the approval of said act. You will make notes upon the papers in all entries made under said act, and opposite the entries on the monthly abstracts, referring to the act of February 10,

1894. Fees and commissions as in other cases, will be required to be paid by parties making such additional entries, and proof of compliance with the homestead law must be shown to the same extent as in other entries for Kickapoo lands, with the exception that residence upon and cultivation of the tract embraced in the original entry shall be considered residence and cultivation *for the same length of time* on the tract embraced in the additional entry. In cases where a party has not made proof upon his original entry, and is competent to make proof upon his additional entry, when he submits the proof on his original entry, he may combine the proofs for both tracts in one proceeding and receive one final certificate embracing both tracts. The additional payments must be made for the respective tracts in accordance with the law governing the disposal thereof.

It must be remembered that, while the parties coming under the provisions of the said act of February 10, 1894, are permitted the privilege of making an additional entry, based on the original entry theretofore made by them, there is no provision permitting the reservation of any particular tracts for their benefit, and, therefore, their claims to any lands under said statute will rest upon a priority of initiation as in other cases.

The homestead commissions for these lands will be computed at the rate of \$1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357 R. S.

Any person applying to enter or file for a homestead under the provisions of section three of the act of March 3, 1893, (*supra*) will be required first to make affidavit, in addition to other requirements, that he did not violate the law by entering upon or occupying any portion of said lands prior to the time fixed in the President's proclamation for legal entrance thereon, the affidavit to accompany your returns for the entry allowed. Affidavit (form 4-102) modified to meet the circumstances, may be used for this purpose. This affidavit will not be required from applicants under the provisions of the act of February 10, 1894, they being granted the right to make an additional entry without any restrictions in respect to prior entrance upon the lands.

Where the preliminary homestead affidavits are executed outside of your offices, before one of the officers named in the acts of May 26, 1890 (26 Stat., 121), or March 2, 18 5 (28 Stat., page 744), they must be accompanied by an affidavit showing a sufficient reason for not appearing before your office to make the same (See circular of April 30, 1895).

Should homestead applicants appear in great numbers before either of your offices to make entry at the time of the opening, you will be governed in your action by the instructions contained in the circular of April 13, 1892 (20 L. D., 7) intended to meet a similar condition.

Should you receive applications by mail when there are a number of applicants in line before your office, you will give each application so received, at the time of its reception, a number following that of the

last applicant in the line, and not act upon said application until its number so determined, is reached in the regular order of business.

Your attention is called to the fact that there is no provision for the ordinary commutation of any homestead entries for said lands, it being specifically provided that section 2301 R. S., shall not apply; but commutation of homestead entries for lands required as townsites may be made under the provisions of section 22 of the act of May 2, 1890, as hereinafter specified.

In regard to the additional payment for said lands, required of homestead settlers, you will be governed by the instructions found in the circular of June 8, 1893 (17 L. D., 52), which has reference to similar payments for other lands in Oklahoma, under the provisions of section 16 of the act of March 3, 1891 (26 Stat., page 1026).

Townsite entries may be made under the general townsite laws as modified by the first proviso to section 22, act of May 2, 1890 (26 Stats., 92), in regard to which you are referred to the circular of July 9, 1886 (5 L. D., 265), or they may be made under the special provisions of the second proviso to said section 22. In regard to cases of the latter class, instructions may be found in the circular of November 30, 1894 (19 L. D., 348).

No comment upon the provisions of the act of March 2, 1895, which have been quoted, appears to be necessary at this time.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

[OPENING KICKAPOO LANDS.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, by a written agreement, made on the ninth day of September, eighteen hundred and ninety-one, the Kickapoo Nation of Indians, in the Territory of Oklahoma, ceded, conveyed, transferred, and relinquished, forever and absolutely, without any reservation whatever, all their claim, title, and interest of every kind and character in and to the lands particularly described in Article I of the agreement, *Provided*, that in said tract of country there shall be allotted to each and every member, native and adopted, of said Kickapoo tribe of Indians, 80 acres of land, in the manner and under the conditions stated in said agreement; and that when the allotments of land shall have been made and

approved by the Secretary of the Interior the title thereto shall be held in trust for the allottees respectively for the period of twenty-five years in the manner and to the extent provided for in the act of Congress approved February eighth, eighteen hundred and eighty-seven (24 Stats., 388); and

Whereas, it is further stipulated and agreed by Article 6 of the agreement that wherever, in this reservation, any religious society or other organization is now occupying any portion of said reservation for religious or educational work among the Indians the land so occupied may be allotted and confirmed to such society or organization, not, however, to exceed one hundred and sixty acres of land to any one society or organization, so long as the same shall be so occupied and used, and such land shall not be subject to homestead entry; and

Whereas, it is provided in the act of Congress accepting, ratifying, and confirming the said agreement with the Kickapoo Indians, approved March third, eighteen hundred and ninety-three (27 Stats., pp. 557 to 563) section three:

"That whenever any of the lands, acquired by this agreement shall, by operation of law or proclamation of the President of the United States, be open to settlement or entry, they shall be disposed of (except sections sixteen and thirty-six in each township thereof) to actual settlers only, under the provisions of the homestead and townsite laws (except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply): *Provided, however,* That each settler on said lands shall, before making a final proof and receiving a certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents an acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the sum to be paid as aforesaid. Until said lands are opened to settlement by proclamation of the President of the United States, no person shall be permitted to enter upon or occupy any of said lands; and any person violating this provision shall never be permitted to make entry of any of said lands or acquire any title thereto: *Provided,* That any person having attempted to, but for any cause failed to acquire a title in fee under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make homestead entry upon said lands."; and

Whereas, allotments of land in severalty to said Kickapoo Indians have been made and approved in accordance with law and the provisions of the before-mentioned agreement with them; and

Whereas, it is provided by the act of Congress for the temporary government of Oklahoma, approved May second, eighteen hundred and ninety, section twenty-three (26 Stats., 92), that there shall be reserved public highways four rods wide between each section of land in said Territory, the section lines being the center of said highways; but no deduction shall be made where cash payments are provided for in the amount to be paid for each quarter section of land by reason of such reservation; and

Whereas, it is provided in the act of Congress approved February tenth, eighteen hundred and ninety-four, (28 Stats., p. 37):

"That every homestead settler on the public lands on the left bank of the Deep Fork River in the former Iowa Reservation, in the Territory of Oklahoma, who entered less than one hundred and sixty acres of land, may enter, under the homestead laws, other lands adjoining the land embraced in his original entry when such additional lands become subject to entry, which additional entry shall not, with the lands originally entered, exceed in the aggregate, one hundred and sixty acres: *Provided*, That where such adjoining entry is made residence shall not be required upon the lands so entered, but the residence and cultivation by the settler upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon the land embraced in his additional entry; but such lands so entered shall be paid for, conformable to the terms of the Act acquiring the same and opening it to homestead entry." and;

Whereas, it is further provided in the act of Congress approved March 2, 1895, (28 Stats., p. 899)—

"That any State or Territory entitled to indemnity school lands or entitled to select lands for educational purposes under existing law may select such lands within the boundaries of any Indian reservation in such State or Territory from the surplus lands thereof, purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement." and:

Whereas, all the terms, conditions, and considerations required by said agreement made with said tribes of Indians and by the laws relating thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with:

Now, therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by the Statutes hereinbefore mentioned, and by other the laws of the United States, and by the said agreement, do hereby declare and make known that all of said lands hereinbefore described, acquired from the Kickapoo Indians by the agreement aforesaid, will, at and after the hour of twelve o'clock, noon (central standard time), Thursday, the twenty-third day of the month of May, A. D., eighteen hundred and ninety-five, and not before, be open to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in the said agreement, the statutes above specified, and the laws of the United States applicable thereto, saving and excepting such tracts as have been allotted, reserved or selected under the laws herein referred to, and such tracts as may be properly selected by the Territory of Oklahoma under and in accordance with the provisions of the act of March second eighteen hundred and ninety-five, hereinbefore quoted, prior to the time herein fixed for the opening of said lands to settlement.

The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Kickapoo Reservation, Oklahoma Territory, to be opened to settlement by proclamation of the President," but notice is hereby given that should any of the lands described in the accom-

panying schedule be properly selected by the Territory of Oklahoma under and in accordance with the provisions of said act of Congress approved March second, eighteen hundred and ninety-five, prior to the time herein fixed for the opening of said lands to settlement such tracts will not be subject to settlement or entry.

Notice, moreover, is hereby given that it is by law enacted that until said lands are opened to settlement by proclamation, no person shall be permitted to enter upon or occupy the same; and any person violating this provision shall never be permitted to make entry of any of said lands or acquire any title thereto. The officers of the United States will be required to enforce this provision.

And further notice is hereby given that all of said lands lying north of the township line between townships thirteen and fourteen north, are now attached to the Eastern Land District, the office of which is at Guthrie, Oklahoma Territory; and all of said lands lying south of the township line between townships thirteen and fourteen north are now attached to the Oklahoma land district, the office of which is at Oklahoma, Oklahoma Territory.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 18th day of May, in the year of our Lord, one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.]

GROVER CLEVELAND.

By the President:

EDWIN F. UHL,

Acting Secretary of State.

SILETZ INDIAN LANDS OPENED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 20, 1895.

REGISTER AND RECEIVER,

Oregon City, Oregon.

GENTLEMEN: I have to call your attention to the proclamation issued by the President on the 16th instant, together with the schedule of lands, copies of which are hereto attached,* by which the lands described in the schedule will be opened to settlement under the statutory provisions therein recited, at and after the hour of 12 o'clock, noon, Pacific standard time, of the twenty-fifth day of July, 1895.

*Schedule not printed.

You will observe with regard to such of the lands described in the schedule as were ceded by the Alsea and other Indians, that the act of August 15, 1894, (Pamphlet Stat., pp. 286 to 338, Sec. 15), provides under Article 6, that—

It is further stipulated and agreed that any religious society or other organization not occupying under proper authority, for religious or educational work among the Indians, any of the lands in this agreement ceded, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at the rate of \$2.50 per acre, the same to be conveyed to such society or organization by patent.

It is further provided that—

The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the town-site law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

Any religious society or other organization applying to purchase any of these lands, under article 6, hereinbefore mentioned, must make proof after six weeks' publication, of its occupancy of such lands on August 15, 1894, and pay for the same at the rate of \$2.50 per acre, within two years from the date aforesaid.

No other applicant will be allowed to make entry of these lands, who does not possess the qualifications required in the case of an ordinary homestead entry under existing law, except in cases of mineral and town-site entries. The homestead applicant must, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at time of making final proof pay the further sum of one dollar per acre, which proof must be made within five years from date of entry, showing three years' actual residence on the land entered. Mineral and townsite entries will be made in accordance with the general laws applicable thereto.

In addition to the usual affidavits required of mineral, homestead and townsite applicants, must be one stating that the applicant did not enter upon and occupy any portion of the lands described and declared open to settlement in the President's proclamation dated May 16, 1895, prior to 12 o'clock noon, of the twenty-fifth day of July, 1895.

The ordinary mineral, homestead and cash blanks will be used for original and final mineral, homestead and townsite entries under the foregoing act, reference being made thereon, and on the abstracts to the act of August 15, 1894, Siletz Indian Reservation lands.

You will not open a separate series of numbers for these entries.

On receipt of this letter you will cause a notice to be published for sixty days in some newspaper of general circulation in the vicinity of

the land, giving the date on which the lands will be opened to settlement and entry. The notice will *not* contain a description of the land.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

WM. H. SIMS,
Acting Secretary.

[OPENING SILETZ RESERVATION.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, pursuant to section one, of the act of Congress approved July thirteenth, eighteen hundred and ninety-two, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-three, and for other purposes," certain articles of cession and agreement were made and concluded at the Siletz Agency, Oregon, on the thirty-first day of October, eighteen hundred and ninety-two, by and between the United States of America and the Alsea and other Indians on Siletz Reservation in Oregon, whereby said Alsea and other Indians, for the consideration therein mentioned, ceded and conveyed to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, except the five sections described in article four of the agreement, viz: section nine, township nine south, range eleven west of the Willamette Meridian, and the west half of the west half of section five, and the east half of section six, and the east half of the west half of section six, township ten south, range ten west, and the south half of section eight, and the north half of section seventeen, and section sixteen, township nine south, range nine west, and the east half of the north-east quarter, and lot three, section twenty, and south half, and south half of north half of section twenty-one, township eight, range ten west; and whereas it is further stipulated and agreed by article six that any religious society or other organization shall have the right for two years from the date from the ratification of this agreement within which to purchase the lands occupied by it, with proper authority, for religious or educational work among the Indians, at the rate of \$2.50 per acre, the same to be conveyed to such society or organization by patent; and whereas it is provided in the *act of Congress*, accepting, ratifying, and confirming said agreement, approved August fifteenth, eighteen hundred and ninety-four (Pamphlet Stats. pp. 286 to 338), section fifteen, that

"The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent," and

Whereas it is provided,

"That immediately after the passage of this act the Secretary of the Interior shall under such regulations as he may prescribe, open said lands to settlement after proclamation by the President and sixty days' notice:" and

Whereas all the terms, conditions, and considerations required by said agreement made with said tribe of Indians hereinbefore mentioned, and the laws relating thereto, precedent to opening said lands to settlement have been, as I hereby declare, provided for, paid, and complied with:

Now, therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by said agreement, do hereby declare and make known that all of the lands acquired from the Alsea and other Indians, by said agreement, will, at and after the hour of twelve o'clock, noon (Pacific standard time), on the Twenty-fifth day of July, 1895, and not before, be opened to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreement, the statutes above specified and the laws of the United States applicable thereto.

The lands to be so opened to settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of lands within the Siletz Indian Reservation, in Oregon, opened to settlement by proclamation of the President, dated May 16th, 1895," and which schedule is made a part hereof.

Warning is hereby given that no person entering upon and occupying said lands before said hour of 12 o'clock, noon, of the twenty-fifth day of July, 1895, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto, and that the officers of the United States will be required to strictly enforce this provision, which is authorized by the act of August 15, 1894, hereinbefore mentioned.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this sixteenth day of May in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.]

GROVER CLEVELAND.

By the President,

EDWIN F. UHL,

Acting Secretary of State.

OKLAHOMA TOWN LOTS—OCCUPANCY.

MCGREGOR *v.* MCGRANAHAN.

One who is within the territory of Oklahoma at the hour of the opening thereof, and occupying at such time a tract of land, is disqualified thereby to enter said land even though within said territory by lawful authority.

Occupancy of a town lot as a basis of title thereto must be maintained, or due effort made to maintain it, until the date of the townsite entry.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (E. E. W.)

STATEMENT.—The townsite of Oklahoma City, Oklahoma, was entered September 5, 1890, and application for deed to lot 1, of block 5, was made by James McGranahan on the 8th day of the same month, and by G. G. McGregor on the 6th day of the following month.

The townsite board held that neither of the parties was entitled to deed, and they both appealed. The General Land Office affirmed the action of the townsite board, and directed that the lot be sold for the benefit of the municipal government of Oklahoma City, as provided by law, and then both parties appealed to the Department.

McGranahan had been living in the Oklahoma country eight or nine years as a keeper of stage stations, and as an employe of government contractors, under permits from the War and Indian Departments, and was postmaster at Oklahoma Station, and had a picket house and a well on the lot, and was residing on it, or on the ground adjoining it, at the time of the opening.

At thirty minutes past twelve o'clock, noon, that day, he drove two small stakes on this lot about seven feet apart, and two others on lot 2, about fourteen feet from the first two. To these stakes he nailed two rounds of planks, each about a foot wide, and wrote his name on them, and set up a flag, as notice of his claim.

This was before any person starting from the outside at 12 o'clock could possibly have reached the place by the swiftest means of travel.

McGregor came on the first train from the south, which arrived at 2:15 o'clock. He went directly to the lot and set two stakes, one of which was afterwards found to be in the street. He set his valise down

on the lot, hung his overcoat on one of the stakes, and remained on the lot himself all that afternoon and night. Later in the afternoon he moved the stake from the street to the lot, and the next day he got two fencing boards about eight feet long, and laid them on the front of the lot. He remained on the ground in the daytime, sleeping on an adjoining lot at night, until the third day after the opening. On that day a committee which had been appointed by a mass meeting of the people to settle disputes, awarded the lot to McGranahan, and then McGregor retired from it, but continued to assert his claim. He protested against the recognition of McGranahan's claim by the town authorities, and on the 3d of May he served written notice on him that he demanded possession, and would contest for deed.

McGranahan has continued to occupy the lot, and has built a house on it and the adjoining lot worth \$2,000.

OPINION.—The act of Congress of March 2, 1889, 25 Stat., 1004, expressly declares that—

Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto.

McGranahan's commission as postmaster, and his permits from the War and Indian Departments, gave him lawful right to be in the Oklahoma country prior to the hour fixed for the opening. But it is evident that he took advantage of the opportunity thus afforded him to occupy and claim the lot before any person starting from the boundary line at 12 o'clock could possibly get to it. This, it hardly seems necessary to say, he had no right to do. To hold otherwise would be equivalent to construing the act to mean that all persons lawfully within the country at the hour of opening should have all the land they desired, and that those who had kept out until that time, in obedience to the law, might take what was left. By being in the country, and on the lot in controversy, at the hour of the opening, even by lawful authority, he disqualified himself to make the entry. This is the penalty which the law imposes upon him for being in there at a time when all persons desiring land there were not permitted to go in and have equal chances with him.

Under the circumstances attending the opening of the country, McGregor's staking and actual possession of the lot for three days, constituted a good initiation of occupancy. But mere establishment of occupancy prior to the date of the entry of the land as a townsite does not entitle him to deed. Occupancy established then was required to be maintained, or due diligence exerted to maintain it, to the date of the townsite entry. This he did not do, and the evidence does not reveal sufficient excuse for the dereliction. He was not in duress, and no force was employed which he was compelled to submit to, or that would have deterred a reasonably prudent man from continuing his occupancy.

The decision of the General Land Office is affirmed, and the papers are herewith returned.

DESERT LAND DECLARATION—ACT OF AUGUST 4, 1894.

HOGE WILSON.

The act of August 4, 1894, validates entries based upon preliminary affidavits executed before United States court commissioners instead of United States circuit court commissioners, if no other objection to such affidavits exists.

A desert land declaration, and affidavits therewith, made outside of the county in which the land is situated, are invalid and cannot be accepted.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (F. W. C.)

In departmental decision of April 27, 1895, your office decision of December 28, 1893, requiring Hoge Wilson, who made desert declaration No. 304, on December 3, 1892, covering the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 1, NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 12, T. 15 S., R. 26 E., Boswell land district, New Mexico, with thirty days to submit new declaration and affidavits made in accordance with law, was affirmed.

The land in question is within Chaves county, while the applicant's declaration and the affidavits of the witnesses were subscribed to before one A. A. Murmod, a United States commissioner in Eddy county.

Under the provisions of the act of May 26, 1890 (26 Stat., 121), these papers might have been executed before a United States circuit court commissioner within the county in which the land is situated, but said act does not authorize the execution of the papers before commissioners appointed by United States courts, hence it was held that the declaration and affidavits in question, following the decision of the Department in the case of Edw. Bowker (11 L. D., 361), were not properly executed, either as to the place or the party before whom taken.

Since the rendition of said decision my attention has been called to the unpublished act of Congress, approved August 4, 1894, entitled: "An Act to provide for the validation of affidavits made before United States commissioners in all land entries." Said act provides:

That all entries under the homestead, pre-emption, timber-culture, or desert-land law made between May twenty-sixth, eighteen hundred and ninety, and the date of approval of this act, and which are based on affidavits made before a United States court commissioner, instead of a United States circuit court commissioner, as provided by the act of May twenty-sixth, eighteen hundred and ninety (twenty-sixth Statute, one hundred and twenty-one), are hereby validated, if no other objection exists; and all final proofs on entries of the classes mentioned made before a United States court commissioner not a United States circuit court commissioner between the dates aforesaid will be adjudicated in the same manner as if said proofs were made before an officer authorized by law to take such testimony.

It will be noted that said act merely validates the affidavits in so far as the objection existed in the matter of the same having been executed before United States court commissioners and they are only validated if no other objection exists.

In the present case the declaration and affidavits were made outside of the country in which the land in question is situated and for that reason were invalid, and upon that ground alone your office decision is sustained and the previous decision of this Department is, with this modification, adhered to.

OKLAHOMA TOWN LOTS—OCCUPANCY.

KNAPP *v.* KALKLOSCH.

As between two claimants for a town lot, where one of the parties establishes and maintains his occupancy in accordance with the voluntary proposition of the other, such occupancy should be recognized as affording a proper basis of title.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (E. E. W.)

Both parties to this contest, T. B. Knapp and Louis J. Kalklosch, claim right to deed to lot 5, of block 11, in Pawnee, Oklahoma, by virtue of improvement and occupancy.

The portion of Oklahoma in which Pawnee is situated was opened to settlement at noon on the 16th of September, 1893. Kalklosch and his wife and Knapp all entered the country together, Kalklosch furnishing the buggy, and Knapp the team. They arrived at the Pawnee townsite at 1.30 in the afternoon of the opening day. The townsite had been surveyed and the blocks and streets staked, though it seems that the lots were not marked, and that no one knew either their size or the way they would front. The lots in block 11 were twenty-six feet and some inches in width, fronting east, and were numbered from 1 to 12 consecutively south from the northeast corner to the southeast corner of the block. Kalklosch immediately staked off a lot fifty feet wide, fronting east, and Knapp and Mrs. Kalklosch went some distance away and staked some lots in block 6. About an hour and a half afterwards parties commenced crowding in on the north of Kalklosch, and it was stated that the lots were only twenty-five feet wide, and that no person would be allowed to hold more than one.

Kalklosch then signalled to Knapp to come to him quick. When Knapp arrived Kalklosch told him that he had more than he could hold, and directed him to take possession and hold the north half. Knapp immediately placed a wagon-cover tent on the lot, and the next morning he and Kalklosch went together and set up a line of post on the north side and front of the lots. About that time the parties on the north moved several feet farther south. It does not appear that Kalklosch and Knapp changed their positions, except that Knapp drew in his north line a few feet. Both of the parties and Mrs. Kalklosch continued to occupy the lots until the following Wednesday, when Knapp had to go to Chandler for supplies, and Kalklosch sent his wife along with him, that being their home. Knapp was gone until the fol-

lowing Sunday, and when he returned he brought his wife with him, and a box of provisions which Mrs. Kalklosch had sent to her husband. Kalklosch was still holding possession of the lots for himself and Knapp, and the latter went on with his wife to Perry and returned to Pawnee the following Wednesday night. He claims that Kalklosch was then to take Mrs. Knapp home, but excused himself from doing so on the ground that his business engagements would not permit it, and Knapp took her home himself, and was gone about a week. When he returned he inquired about the lots, and told Kalklosch that he could sell his for \$100. Kalklosch then declared that Knapp had no lot; that he had left him there in the dust with nothing to eat to hold the lots, and that both of them now belonged to him. He also contended that in crowding farther south the parties on the north had overrun the lot which he had given to Knapp, and that the two lots which he was at present holding belonged to him alone. Knapp disputed this, erected a tent on the lot he claimed, and went ahead making other improvements. The tent remained on the lot about two weeks, and then he made a shallow excavation, and had stone hauled and placed on the lot for a foundation for a house. Kalklosch also commenced to improve the lot, tearing down Knapp's foundation, and using some of his stone for the foundation upon which he erected a frame office building. Knapp also put up some sort of a frame structure, which Kalklosch tore down and removed from the lot. Knapp then set it up on a lot in the rear of Kalklosch's. When the town was surveyed it was found that Kalklosch was on lot 6 and the ground Knapp claimed was lot 5, the lot in controversy.

The townsite was entered by the townsite board on the 23d of October, 1893, and Kalklosch applied for a deed on the 13th of November, and Knapp on the 23d of the same month. The townsite board awarded the lot to Knapp and Kalklosch appealed. The General Land Office reversed the townsite board and found for Kalklosch, and then Knapp appealed to the Department.

It is stated in the decision of the General Land Office that, "It is worthy of note that not a material allegation in Knapp's testimony is verified by a single witness." The Department is of the contrary opinion. In fact, as the testimony is read here, Knapp is corroborated upon nearly every material point by every witness who testified, including Kalklosch himself. Kalklosch admits that he called Knapp off of block 6, and told him that he could not hold fifty feet, and that he would rather see him take the north half of it than have a stranger get it, and that Knapp did take possession and did all the things that he claims to have done in the way of setting posts and holding the lot. The only difference between Kalklosch and Knapp is that Kalklosch claims that it was lot 4, and not the lot in controversy that he gave Knapp, and that Knapp allowed Toles to take it from him. Knapp swears positively that, while he did not know the number then, the

spot where he erected his tent was on lot 5. On this point he is corroborated positively by the witnesses Berry and Puterbaugh, and not contradicted by any witness, but rather supported by all of them, except Kalklosch himself.

But whether Kalklosch occupied lot 5 or 6, and gave Knapp lot 4 or 5, is immaterial; for, concluding that he could not hold fifty feet, he called Knapp off of the lots he had taken elsewhere, and gave him the north twenty-five feet. Even if it is true that they shifted twenty-five feet farther south (which is not clearly proven, however), that is also immaterial; for there is good reason for believing that he could not have held fifty feet without Knapp's aid. Anyhow, he believed so at the time, and in good conscience he should share the lots with him, according to his own voluntary proposition. Knapp went ahead in good faith in his efforts to improve the lot, and was persisting in his claim and continuing his efforts at the date of the entry of the land as a townsite, and it is the opinion of the Department that he is entitled to deed.

The decision of the General Land Office is, therefore, reversed.

RAILROAD GRANT—SELECTION—MINING CLAIM.

SOUTHERN PACIFIC R. R. CO. v. GRIFFIN ET AL.

An application for a mineral patent should not be allowed, where the land embraced therein is covered by a railroad selection of record, without due notice to the company.

Placer claims on surveyed lands must conform to the legal sub-divisions thereof.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (P. J. C.)

The land involved in this controversy is part of Sec. 31, T. 3 N., R. 1 E., S. B. M., Los Angeles, California, land district. This tract was within the limits of the grant to the Southern Pacific Railroad Company under act of Congress of March 3, 1871, and was selected by said company October 19, 1888, list No. 35. The township plat was filed in the local office January 11, 1876.

On October 27, 1891, James T. Griffin and G. Clinton Gardner filed their mineral application for the "Valley Consolidated Gold Mine No. 1," embracing several locations of placer mining claims, a part of which was in said Sec. 31, and final entry of said tracts was made December 29, 1892, mineral entry No. 131.

The papers of this entry were transmitted to your office, and by letter of May 18, 1893, your office found some objections to the abstract of title, and returned the same for correction, and also called the attention of the local officers to the fact that the land in section 31 had been selected as aforesaid, and requiring them to give the railroad company

notice of the pendency of the entry, and that thirty days would be allowed it in which to show cause why its list No. 35 of selections should not be held for cancellation, to the extent of the area in conflict with the mineral entry.

I deem it only necessary to refer at this time to the action of the railroad company in connection with this notice. In pursuance of this notice, the company by its attorney, filed a protest against said mineral entry, setting forth the facts in regard to the grant by Congress; the withdrawal of the lands within the grant; the selection of Sec. 31; the return of the United States surveyor-general, showing that the land was agricultural in character; and want of notice to the company of the mineral application; setting forth that the application to list this land contained the affidavit required, in accordance with the regulations, that said land was not mineral in character, and demanding that the "proceedings in said entry be set aside until proper steps have been taken to determine the character of the land in the manner provided by law."

When this matter again came up in your office for consideration, on December 11, 1893, it was decided—

In view of the showing made of the mineral character of the land embraced in this group of claims, and in the light of said departmental decision, (*Central Pacific Railroad Company v. Valentine*, 11 L. D., 238) and for the further reason that said protest is not under oath and entirely uncorroborated, I do not think this office would be warranted in ordering a hearing. Said protest is accordingly dismissed, and list No. 35 is held for cancellation to the extent of the conflict.

From this decision the railroad company appealed, assigning numerous errors of law.

The selection of this land by the railroad company was a segregation of the same, in so far as it would protect the railroad company against the claim of anybody else, and it was error in the local office to allow this application for patent without first ordering a hearing for the purpose of determining whether or not the land was mineral in character. The records of the local office should have shown the selection by the railroad company, and it should have been given notice of any application to secure the same by other parties. Hence I think that it matters not whether the protest of the railroad company was under oath or not. The recitals in the protest are matters of record in your and the local office, and were sufficient to have demanded notice to the company of this application.

It has been held by the Department that where a legal location has been made upon land returned by the Surveyor-General as agricultural in character, the burden of proof shifts upon the agricultural claimant to prove the non-mineral character of the land. (*Northern Pacific Railroad Company v. Marshall*, 17 L. D., 545.) But this presumption does not go to the extent of warranting the local officers, upon presentation of an application for mineral patent to land that has been

segregated from the public domain, in permitting an entry to be made without due and proper notice to those whose entries or selections appear of record.

It is also held in the case *Ferrell et al. v. Hoge et al.*, (18 L. D., 81), that the mining law requires a discovery on each twenty acre tract included within a placer location in order to make it valid.

Your office judgment is therefore reversed, and you will direct the local officers to order a hearing to ascertain the character of this land.

I also, in this connection, desire to direct your attention to the fact that sec. 2331, Revised Statutes, demands that placer claims upon surveyed lands shall conform to the legal subdivisions thereof. The several placer claims included in this application have been located since the township was surveyed and there is no attempt made on the part of the applicants to make them conform to the requirements of the statute, nor do I find any reason for their irregular location assigned in the notes of the surveyor-general.

RULE OF PRACTICE 43 AMENDED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C.

Rule of Practice Number 43 is hereby amended by adding the following:

In cases dismissed for want of prosecution, the Register and Receiver will, by registered letter, notify the parties in interest of the action taken, and that unless within thirty days, a motion for re-instatement shall be made, the default of the plaintiff will be final, and that no appeal will be allowed; which notice shall be given as provided in circular, 5 L. D., 504.

If such motion for re-instatement be made within the time limited, the local officers shall take action thereon, and grant or deny it as they deem proper. If granted, no appeal shall lie. If overruled, the plaintiff shall have the right of appeal, the time for which shall be thirty days, and run from the date of written notice to the plaintiff.

EDW. A. BOWERS,
Acting Commissioner.

Approved, June 1, 1895.

HOKE SMITH,
Secretary.

REINSTATEMENT—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

CRAIG v. KROMZZINSKI ET AL.

A canceled entry cannot be reinstated for the benefit of transferees on the ground of its cancellation without notice to said parties, where it appears that they were not entitled to notice of the proceedings, and the adverse right of another has intervened.

The confirmatory provisions of section 7, act of March 3, 1891, were not intended to disturb vested interests acquired prior to the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (J. I. P.)

By letter "H" of April 9, 1894, your office transmitted here the separate appeals of the Edinburg Land Mortgage Company and of August Nickel, from its decision of February 7, 1894, declining to reinstate homestead entry No. 12,683, made February 25, 1880, Sioux Falls, South Dakota, series, for the NE. $\frac{1}{4}$ of Sec. 9, T. 102 N., R. 52 W., and final certificate No. 5,743, issued thereon, and holding also that timber culture entry No. 15,051, made December 26, 1889, for said tract, should remain intact.

Briefly stated, the facts in this case are as follows:

The homestead entry for said tract was made by Stephen Kromzzinski, February 25, 1880. May 8, 1885, the homestead entryman made his final proof, upon which final certificate No. 5,743 was issued.

June 18, 1885, Kromzzinski mortgaged said tract to the Edinburg American Land Mortgage Company.

September 22, 1885, he sold and conveyed the same to Frank Nickel, and soon after left the country, and his whereabouts have not since been ascertained.

October 22, 1885, your office, not being satisfied with Kromzzinski's final proof, called for further evidence from said entryman as to his residence and cultivation, and at the same time returned the final certificate for correction so as to show the entryman's name, it having been issued in the name of "Hoonizzinski."

Notice of said demand was sent to Kromzzinski by the local office, by registered mail, to the post office nearest said tract, but said notice was returned unopened. Repeated calls were made by your office for said additional evidence, and notice thereof was sent to said entryman by registered letter to the post office nearest said tract; but all of said notices were returned unopened, and marked uncalled for. Finally, on October 14, 1887, after having prior thereto held said final certificate for cancellation, of which the entryman was notified in the manner above stated, your office canceled said final certificate and homestead entry, and directed the local office to so note on their record, with the statement that "this decision is considered final, and the case is this day closed." Of this action by your office the homestead entryman was advised in the same manner as of the proceedings above detailed.

December 26, 1889, Susie Craig made timber culture entry No. 15,051 for said tract.

February 4, 1890, proceedings were instituted by August Nickel, as transferee, for the reinstatement of Kromzzinski's entry, and the case coming finally to the Department, it took the following action thereon December 17, 1892—

I have therefore concluded to order a hearing, with notice to all parties concerned, to determine whether the entryman or either of the transferees had notice of the action of your predecessor, and for Susie Craig to show cause why her entry should not be canceled. When the testimony shall have been taken the case will be adjudicated by the local officers and then allowed to take its usual course.

Your judgment is thus modified.

It was not the purpose of that order to reopen the whole case, unless upon inquiry it should be found that the entryman or the transferees were entitled to notice, and had not received it. It is shown that notice was sent to the entryman of all the proceedings had, but that he never received any of them, for the reasons stated. It is also shown that neither of the transferees nor the mortgagee herein, ever received any notice of any of said proceedings, and that they were not entitled to receive notice therein, for the reason that none of them had ever filed any notice of their interest in the premises. (*American Investment Company*, 5 L. D., 603; *Van Brunt v. Hammond*, 9 L. D., 561.)

In view of these facts, your office decision appealed from reversed that of the local office, by holding as stated in the beginning of this decision.

It is evident that a showing by these transferees and this mortgagee, under the Department's order of December 17, 1892, that they received no notice of the proceedings resulting in the cancellation of Kromzzinski's entry, could give them no rights when they were not entitled to any notice, and Kromzzinski's rights in the premises had been fully and finally passed on by your office decision of October 14, 1887, cancelling his entry and closing the case, from which no appeal was ever taken, and that action, in my judgment, is the controlling point in the case.

When Craig made her timber culture entry on December 26, 1889, said tract, so far as the records showed, was vacant public land. The rule in such case is that an order of cancellation is final as to the rights of the entryman, in the absence of appeal, and no rights under the canceled entry can be subsequently asserted as against the intervening adverse claim of another. (*Dornen v. Vaughn*, 16 L. D., 8.)

The right to reinstatement cannot be recognized, where the adverse action has become final, and the claim of another intervenes. (*Merritt v. Philp*, 16 L. D., 404.)

It is insisted by the mortgagee and transferees that Kromzzinski's homestead entry is confirmed by section 7 of the act of March 3, 1891 (26 Stat., 1095). But to so hold would be to divest vested interests

acquired prior to the date of its passage, as were those of Craig in this case, which, I am persuaded, was never a part of the legislative intent, when said act was passed.

However much the facts here involved are to be deplored, so far as the transferees and mortgagee are concerned, yet this Department must administer the law as it exists; it cannot legislate.

The unusual circumstances surrounding this case have, in my opinion, warranted the extension of this opinion beyond a simple affirmance.

Your office decision is affirmed, on the grounds and for the reasons herein stated.

RES JUDICATA—SCHOOL INDEMNITY SELECTION—SETTLEMENT RIGHTS.

DOHRMAN *v.* KRIEGER ET AL.

The Commissioner of the General Land Office has no authority to entertain a motion for the review of a decision that has become final for want of appeal.

A school indemnity selection cannot be regarded as the renewal of a previous selection where neither the base alleged, nor the land claimed, are the same in the two selections.

Conflicting settlement rights acquired prior to survey may be adjusted by the allowance of an entry, made under agreement on the part of the entryman to convey to the other claimant the land actually included within his possession.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (J. L.)

I have considered the above entitled case upon the appeal of H. G. F. Dohrman from your office decision of March 27, 1893, affirming the decision of the local officers, and holding his homestead entry, No. 5726, for cancellation, as to lot 4 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (sometimes called the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$) of section 21, T. 2 N., R. 4 W., Mt. Diabolo meridian, containing 73.88 acres of land, in San Francisco land district, California.

The official plat of the survey of said township was filed in the local office on December 10, 1883. On the same day Dohrman made homestead entry, No. 5726, of lot 4 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 21, T. 2 N., R. 4 W. (containing 153.88 acres), alleging settlement in the year 1856, and residence ever since. Said entry was afterwards on Aug. 31, 1891, amended so as to embrace only lots 4 and 5, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 21, containing 144.75 acres, in obedience to directions by the Commissioner of the General Land Office, given in office Letters "H" of July 5, 1890 and July 21, 1891, respectively, addressed to the local officers.

On December 15, 1883, Wilhelm Krieger filed his pre-emption declaratory statement, No. 17,853 for lot 1 of section 17; lots 1 and 2 and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 20; and lot 4

and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 21, of the township aforesaid, alleging settlement November 10, 1859; and embracing in his said declaratory statement 295.74 acres of land.

Afterwards on December 29, 1883, Krieger, by M. D. Hyde, Esq., his attorney, (who appeared also as attorney for the State of California), procured E. Twitchell, "Deputy State Surveyor General," to file in the name of the State of California an application to select lot 4 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 21 aforesaid (containing 73.88 acres), in lieu of, or as indemnity for, part of the deficiency in the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 36, T. 10 N., R. 9 W., Mount Diabolo meridian.

By letter "C" of September 30, 1885, your office held said application for cancellation for conflict with the homestead entry, No. 5726, of H. G. F. Dohrman, made December 10, 1883; and directed the local officers to advise all parties in interest and allow the usual time for appeal. No appeal was taken, and the decision became final.

On December 13, 1886, F. A. Hyde, Esq., as attorney for the State of California, filed in your office a motion for a review of said decision, rendered more than fourteen months before; and on October 3, 1887, your office overruled said motion, saying among other things:

The error alleged in this case is, that the selection was a relocation under the act of July 23, 1868, and that a contest between the State and the homestead claimant was pending at the date of said decision.

Under the rulings of this Department a relocation by the State for the purpose of correcting the basis of a selection "is virtually a new selection, and could not affect any valid pre-emption right accruing in the meantime, and attaching to the land;" that "where the first selection was illegal, the second selection of the same tract must be formally made." (*State v. Haile et al.* and *State v. Floyd et al.*, 1 Copp's Land Laws, pp. 324 and 326, Edition of 1875.)

The records of this office do not show any contest pending in the above case. And as the homestead entry (Dohrman's) was of prior date to the selection by the State, I see no good reason for reconsidering my former decision in the case.

The facts recited in said opinion are sustained by the record before me; and would have justified the overruling of the motion for review if it had been filed in time. But your office had no authority to entertain such motion after the lapse of the time prescribed in the Rules of Practice.

In your office letter "C" of December 13, 1887 (more than two years and two months after the first decision), the Acting Commissioner said to the register and receiver:

I am in receipt under date of October 11th last, of a letter from F. A. Hyde, Esq., attorney for the State, wherein, referring to the decision of this office of October 3, 1887, denying his motion for a reconsideration of office decision of September 30, 1885, holding for cancellation certain indemnity school selections, viz: R. & R. 4066 of lot 4 and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 21, T. 2 N., R. 4 W., M. D. M. made December 29, 1883 in lieu of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ Sec. 36, T. 10 N., R. 9 W., M. D. M., was an application for land which had not been surveyed by the United States; that said application was made June 25, 1863, from a survey executed by the county surveyor, notice of which was filed in the local office on the last mentioned date.

In view of the facts stated, Mr. Hyde renews his application for a reconsideration of the decision of September 30, 1885, so far as relates to the above-mentioned selection.

Said letter from F. A. Hyde, Esq., cannot be found, and I have to rely on your office recitals for its contents. The "facts" alleged by Mr. Hyde in said letter are not sustained, but on the contrary they are contradicted by the record before me.

In said letter "C," of December 13, 1887, the acting Commissioner further said:

It appears further, that at the time the former decision was rendered there was a contest pending between the parties named, (a fact which was unknown to the writer of said decision), which is still undecided in this office. The decision of September 30, 1885, was therefore premature, so far as it related to the above selection, and the same is hereby rescinded to that extent.

The writer of the last quoted paragraph was mistaken. The State of California was not a party to the contest involving the land now in controversy, then pending and undecided in your office. The State's school-indemnity application filed December 20, 1883, was on its face an *ex parte* application. Your office decision of December 13, 1887, rescinding the decision of September 30, 1885, was based upon errors as to supposed facts. Your office had no authority upon the *ex parte* statement of the attorney of the defeated party, to re-open a case which had been closed for two years, and unsettle rights which had become vested under a decision which had become final.

The State of California being thus eliminated from this controversy, it only remains for me to consider the relative rights of Dohrman and Krieger in the premises.

The record before me shows the following facts:

On June 25, 1863, the State of California filed in the local office two selections of school indemnity lands, based upon unofficial surveys: One at the request and for the use of H. C. F. Dohrman (the deceased father of the present homestead entryman) for two hundred and eighty acres of land, embracing 52.04 acres of the land now in controversy; and the other, at the request and for the use of Wilhelm Krieger (the present pre-emptor), for one hundred and twenty acres of land, embracing 21.84 acres, the residue of the land now in controversy.

The land selected for and sold to Dohrman was described as follows:

The fractional W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, fractional E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of section 21, T. 2 N., R. 4 W. Mount Diablo meridian.

Taken in lieu of—

SW. $\frac{1}{4}$, W. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of section 36, T. 7 N., R. 35 W., San Bernardino meridian.

The land selected for and sold to Krieger was described as follows:

W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ (fractional) of section 21, and E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ (fractional) of section 20, T. 2 N., R. 4 W., Mount Diablo meridian.

Taken in lieu of—

E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of section 16, T. 9 N., R. 35 W., San Bernardino meridian.

The land selected on December 29, 1883, after Dohrman had made his homestead entry, is described as follows:

Lot 4 and SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of section 21, T. 2 N., R. 4 W., Mount Diablo meridian, containing 73.88 acres.

Taken in lieu of, or as indemnity for—

Part of the deficiency in W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of section 36, T. 10 N., R. 9 W., Mount Diablo meridian.

And it includes 52.04 acres of the identical land, which was selected for and sold to the elder Dohrman, and 21.84 acres of the identical land which was selected for and sold to Krieger, as hereinbefore stated.

The contention of M. D. Hyde, Esq., as attorney for Krieger and for the State of California, that the selection of December 29, 1883 is a relocation or a reselection, or a renewal, of the two selections of June 25, 1863, or of either of them, cannot be seriously entertained. Their bases are different. The lands selected are different. Neither of the selections of June 25, 1863 embraced, nor was intended to embrace, all of the land now included in the fractional west half of the northwest quarter of section 21, according to the official survey. The tract of two hundred and eighty acres selected for and sold to Dohrman, the elder, and the tract of one hundred and twenty acres selected for and sold to Krieger, were bounded by a line running diagonally northeast and southwest across the present fractional W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 21, which for several years previous, had been marked by a ditch and a fence, which were recognized as the true boundary between the settlements of Krieger and Dohrman respectively. The land described in the Dohrman selection in accordance with the county survey was intended to include, and did include, 52.04 acres of the land now in controversy lying east of and adjoining the diagonal boundary line aforesaid. The land described in the Krieger selection in accordance with the county survey was intended to include, and did include, 21.84 acres lying west of and adjoining the diagonal boundary line aforesaid. The selection of December 29, 1883, included both of said parcels of 52.04 acres and 21.84 acres as one parcel of 73.88 acres of land, and must be regarded as a new selection subsequent to H. G. F. Dohrman's homestead entry, and resting upon a basis never mentioned before. Krieger's settlement never did extend, either in fact or in intention, eastwardly beyond the diagonal boundary line aforesaid. Dohrman's settlement never did extend, either in fact or in intention, westwardly beyond said boundary line. That boundary line should be recognized and respected by both parties in this case.

This equitable result will be accomplished by executing and enforcing your office decision of July 5, 1890, involving the land here in contest,

and rendered in the case of John Kavenagh v. Joseph Pfister, Henry G. F. Dohrman, Wilhelm Krieger and six other defendants, whose filings and entries within the township aforesaid overlapped each other, and whose claims conflicted in parts, only because the well-known and long established boundaries of their respective settlements and claims, did not coincide with the sub-divisional lines of the official map. (See your office letter "H" of July 5, 1890, addressed to the register and receiver, San Francisco, California.)

In that case your office decided as follows:

Under the peculiarly complicated circumstances of this case, I am of the opinion that the rights of the parties hereto should be determined under Sec. 2274, Revised Statutes, which substantially provides that when settlements have been made upon agricultural public lands, prior to survey thereof, and two or more settlers have improvements upon the same legal subdivision; then, such settlers may make joint entry of such land, or any such settler may enter into a contract with his co-settlers to convey to them their respective portions of said land after patent is issued to him; and in the latter event, proof of joint occupation by himself and others of such contract, shall be equivalent to proof of sole occupation and pre-emption by claimant.

The fact that in the case under consideration all the parties filed their declaratory statements or made entry before such contract to convey was entered into, should not be held to exclude them from the provisions of said section. It is evident that all parties herein have acted in good faith, and in the case of *Lord v. Perrin* (8 L. D., 556), it was held that a failure to comply with any of the literal and technical requirements of said section would not defeat the enjoyment of the benefits of the law by one who obviously came within the scope of its purposes, and was acting in good faith.

The above ruling is also supported by the case of *Edward J. Doyle*, 7 L. D., 3, and *Celeman v. Winfield*, 6 L. D., 826.

Under the foregoing authority, therefore, upon duly submitted final proof, you will allow any of the parties to this case to make entry of not to exceed one hundred and sixty acres of the tract for which said party may have filed or applied, upon condition that he tender to each of the other parties herein, who have filings or entries thereon, an agreement in writing (if he has not already done so) to convey to such other party that portion of said tract covered by their respective possessions and improvements.

In case two or more of said parties should insist upon making an entry of the same tract, you will allow the party to make such entry who, having qualified as above set forth, first responds to the notice hereinafter directed to be given.

Also notify all parties in interest of this decision, and that they are allowed the period of sixty days from service of notice, in which to make entry of the respective tracts herein involved upon the terms and conditions above named, in accordance with said Sec. 2274, of the Revised Statutes.

I approve and confirm said decision, which was an adjudication of the rights of Dohrman and Krieger, respectively, from which there was no appeal, and which has become final. I direct that your office proceed to carry it into effect so far as it concerns the tract of land involved in this case. And whenever it shall be shown to your office, that Dohrman (as he alleges in his appeal), has fully complied with the terms of your office decision above quoted, and has executed an agreement in writing to convey, or a sufficient deed conveying, to Krieger that portion of the tract in contest, which is covered by Krieger's pos-

session aforesaid, your office will hold Dohrman's homestead entry intact, and allow him to make final proof thereon, and permit him to modify his non-alienation affidavit, so as to except therefrom the partial alienation made by him in obedience to the requirements of the Land Department.

Your office erred in holding that the act of July 23, 1866 (14 Stat., 218), justifies your office decision. If it were at all applicable to this case, its only effect would be to confirm to the heirs of Dohrman, and to Krieger, respectively, the identical parcels of ground *in loco*, which were sold and conveyed to them in good faith, by the State of California, in the year 1863.

Krieger's declaratory statement, No. 17,853, filed December 15, 1883, must be cancelled so far as it conflicts with Dohrman's entry of December 10, 1883, for two reasons; because it is subsequent in date; and, because the law does not allow more than one hundred and sixty acres of land to be claimed under one pre-emption declaratory statement.

Therefore, your office decision of March 27, 1893, is hereby reversed. And your office will proceed in the case as herein directed.

OKLAHOMA TOWN LOTS—PURPOSE OF APPROPRIATION.

WEATHERS *v.* WALLACE.

Town lots may be taken either for business or residence purposes; and it is not a material fact that the claimant owns other lots and intends all of them together as a homestead, and is using the lot applied for as a garden.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (E. E. W.)

STATEMENT.—The land embracing lots 22, 23 and 24, of block 48, in Norman, Oklahoma, was entered as a part of the townsite of that town on the 16th of November, 1891, and the contestant Fannie J. Weathers, and the contestee, W. T. Wallace, both applied for deed for these three lots on the 2d of December of the same year.

The townsite board awarded the lots to Wallace, and Mrs. Weathers appealed. The General Land Office reversed the townsite board, held that neither of the parties was entitled to deed, and that the lots should be disposed of for the benefit of the municipal government of the town of Norman, as provided by law. Mrs. Weathers appealed again, but Wallace seems to have acquiesced in the decision, as he has not appealed, and the only question for consideration here is the claim of the contestant.

This claim is based on the following facts: In January, 1891, one J. P. Fry took possession of the lots, plowed them, and built a post and a one or two-board fence around them. He testifies that they were then vacant and entirely unimproved, and had been ever since he first became acquainted with them, which was in July, 1889. On the 2d of

February, 1891, he assigned his claim to them to Mrs. Weathers. She testifies that from the date of her purchase of Fry's right to the lots she has lived with her married daughter on the lots adjoining them, and cultivated and used them as a garden, under the fence put around them by Fry. She was so using and occupying them on the 16th of November, 1891, upon which date the land was entered as a townsite. She testifies that it is her intention to use the lots, together with others adjoining them, for purposes of residence, and that her failure to make more substantial and valuable improvements has only been due to her financial inability.

OPINION.—The law authorizes lots to be taken either for purposes of business, or for purposes of residence, upon the single consideration that the claimant shall in good faith occupy and improve them. The character of the improvements required to be made is not defined, nor their value specified, further than that they shall be sufficient to put the world on notice that the claimant has in good faith taken possession of the lot, subjected it to his will and dominion, and appropriated it to his own use. In passing upon their character and value, it is proper to consider both the financial ability of the claimant and the facilities within his reach for making improvements. Actual occupancy and appropriation to use in good faith is the test.

In this case the contestant has the right to take the lots for purposes of residence, and the fact that she has other lots, and intends all of them together for a homestead, and is using these as the garden part, makes no difference.

Her inclosure and cultivation of the lots were sufficient to show her appropriation of them for that purpose, and entitle her to deed.

The decision of the General Land Office is reversed, and the townsite board will be directed to execute deed to Mrs. Weathers.

RAILROAD GRANT—ADJUSTMENT—LANDS RESERVED.

CHAPMAN ET AL *v.* BURLINGTON AND MISSOURI RIVER R. R. CO.

The grant to this company in the State of Nebraska contemplates that one-half of the land granted shall be taken on each side of the road; but in the adjustment of said grant the company has received more lands than it is entitled to, the excess lying on the north side of the road, and although suit is pending for the recovery of said excess, and that under the act of March 3, 1887, no more lands can be patented to the company, yet lands on the south side of said road, where the grant is deficient, that were subject to the grant at definite location, are not open to entry, but must remain in reservation, subject to such farther disposition as the action of the court on the suit to recover may seem to require.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 18, 1895. (F. W. C.)

I have considered the appeal filed on behalf of George B. Chapman, Chas. R. Metteer and John Philpots, sr., from your office decision of October 3, 1891, sustaining the action of the local officers in rejecting

their several applications to enter the whole or a part of the SW. $\frac{1}{4}$ of Sec. 27, T. 11 N., R. 12 E., Lincoln land district, Nebraska, for conflict with the grant made by the act of July 2, 1864 (13 Stat., 356), for the benefit of the Burlington and Missouri River Railroad company.

Said tract is within the limits of the grant for said company, as adjusted to the map of definite location filed June 22, 1865, the land in question being to the *south* of the road.

On November 15, 1878, the company made application to list this land but the local officers failed to certify the list, and no further action appears to have been taken thereon.

On February 16, 1884, Chapman made application to homestead the entire SW. $\frac{1}{4}$, but made no allegation of previous settlement or improvement. His application was rejected for conflict with the grant, from which action he appealed to your office.

On March 22, 1884, Metteer made application to file pre-emption declaratory statement for the same land, alleging that he had, two year prior thereto, purchased some improvements upon this land from one Mrs. Murphy, for \$700, and that he had resided thereon, making improvements. His application was also rejected for conflict with the grant and he appealed to your office.

On April 29, 1884, Philpots applied to file pre-emption declaratory statement for the W. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section, alleging that he had improvements thereon and that he had the entire eighty acres for which he applied under cultivation.

None of these parties alleged any claim for themselves, or any other party, at the time of the definite location of the road, so that, as shown by the record, the land was free from claim at that date and subject to the grant.

The appeals of all these parties are based upon the ground that said company has already received more lands than it is entitled to under its grant, and for that reason their applications for the land in question should have been allowed.

Under an adjustment of the grant, prepared in accordance with a decision of this Department, it appears that this company has received lands in excess of that to which it is entitled, for the recovery of which a suit has been recommended, as contemplated by the act of March 3, 1887 (24 Stat., 556).

In departmental decision of March 29, 1888 (6 L. D., 589), it was held that the grant of 1864 authorizing this company to extend its line through Nebraska, contemplated that one-half of the land granted should be taken on each side of the road, and that there is no authority for enlarging the quantity on one side to make up a deficiency on the other. The adjustment referred to shows that the excess lies to the north of the road, while to the south of the road where the tract in question is situated, the grant is deficient.

While under the provisions of the act of March 3, 1887, *supra*, no further lands can be patented on account of such grant, the amount

already received being in excess of that to which the company is entitled, yet as the grant to the south of the road is deficient, the land in question must remain in reserve in satisfaction of the grant, subject to such further disposition as the action taken by the court in the government suit for the recovery of the excess to the north of the road may warrant.

The action of your office in rejecting these applications was proper, and the same is accordingly affirmed. Said applications will stand rejected.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE.

PRITCHARD *v.* NORTHERN PACIFIC R. R. CO.

The statutory withdrawal on general route, under the grant to this company, is not defeated, nor impaired by an erroneous order of restoration issued by the General Land Office.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (F. W. C.)

I have considered the motion forwarded with your office letter of February 7, 1895, for the review of departmental decision of December 11, 1894, not published, in the case of And. J. Pritchard *v.* The Northern Pacific Railroad Company, involving the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 11, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ Sec. 13, T. 48, R. 3 E., Coeur d'Alene land district, Idaho, in which the action of your office in sustaining the rejection of Pritchard's application to enter said tract for conflict with the grant for said company was affirmed.

As presented at the time of the consideration of Pritchard's appeal from the action of your office sustaining the rejection of his application, it appeared that this tract was within the primary limits of the grant for said company as shown by the map of definite location filed December 12, 1882, and was also included within the limits of the withdrawal upon the map of general route of the main line of said road, filed February 21, 1872.

Pritchard's application was presented on January 22, 1892, and in support thereof he alleged settlement upon the land in October, 1879, which being subsequent to the withdrawal of 1872 upon the map of general route, was held to be ineffectual as against the grant for said company.

In the motion for review it is urged, however, that the land in question was restored prior to Pritchard's settlement and was therefore subject to his settlement in 1879, which being continued until date of definite location of the company's road was a bar to the attachment of rights under the grant.

In order that this Department might be in possession of the facts relative to the alleged restoration, reports were called for by departmental letters of March 5 and April 18, 1895, in response to which

reports were made by your office letters "F" of March 20, 1895, and April 30, 1895. From these reports it appears that the lands here in question were included within the limits of the withdrawal upon the map of general route for the main line, filed February 21, 1872; that the southern limit of the withdrawal upon the map of general route of the branch line, filed August 15, 1873, comes very close to this land; that by letter of October 28, 1876, the local officers at Lewiston, Idaho, were furnished with a diagram, which is designated as diagram No. 2, which your letter states "was prepared in accordance with the map filed by the company in August, 1873, and in connection with the surveyed boundary line between Washington and Idaho," and in this letter it appears that the local officers were directed to restore all the lands included within the withdrawal of April 15, 1872, lying south of the amended line. This letter, it would appear, confounded the limits of the withdrawal upon the map of general route of the main line with those upon the branch line, and as a result thereof the land in question, together with many other tracts, although included within the withdrawal upon general route of the main line were ordered restored to the public domain.

For such restoration there was clearly no authority of law, and the rights of the company in the premises can not be avoided by reason of said error on the part of your office.

These lands having been included within the withdrawal upon the map of general route of the main line filed February 21, 1872, remained withdrawn, said withdrawal being authorized and directed by the statute, and it was not in the power of your office to restore them to settlement and entry. No rights were therefore acquired by Pritchard under his settlement made in 1879, the land being shown by the definite location of the road, as before stated, to be within the primary limits, and the previous decision of this Department sustaining the rejection of his application for conflict with the grant is adhered to and the motion for review is accordingly denied.

This would seem to be a case in which the company might be requested to relinquish, under the provisions of the act of June 22, 1874, as amended, upon the filing of which they would be entitled to select other lands within the limits of their grant.

NORTHERN PACIFIC R. R. Co. *v.* KNUDSON.

Motion for the review of departmental decision of February 23, 1895, 20 L. D., 127, denied by Secretary Smith, May 18, 1895.

MINING CLAIM—ALUMINA—AGRICULTURAL CLAIM.

JORDAN v. THE IDAHO ALUMINIUM MINING AND MF'G. CO.

Alumina is not such a mineral as will except the land containing the same from settlement and entry as agricultural land, or warrant the allowance of a mineral entry thereof.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1895. (P. J. C.)

Your office, by letter of December 24, 1892, to the local officers at Coeur d'Alene, Idaho, acknowledged receipt of their letter of December 6, preceding, in which was enclosed the "papers pertaining to mineral entry No. 125, filed September 19, 1892, by the Idaho Aluminium Mining and Manufacturing Company, for its placer claim, containing 104.24 acres, designated as survey No. 1001;" also the protest of Patrick Jordan against said mineral application, alleging, among other things, that he was residing upon said land, and claimed it by virtue of settlement thereon under the laws of the United States, and that he intended to acquire title to the same as soon as it should be surveyed, reciting the value of his improvements thereon, and alleging that the same contains no valuable mineral deposit whatever.

It appears that the local officers rejected said application, for the reason that protestant alleged that there was a suit then pending in the State court between the parties to determine the character of the land, and they being undecided as to what course to pursue, asked for instructions.

By said letter of December 24, 1892, your office directed that a hearing be ordered for the purpose of determining whether the land embraced in the application was valuable for minerals, or more valuable for mining than for agricultural purposes.

None of the papers in connection with this entry or protest are before me, but these facts I glean from the correspondence above referred to.

A hearing was accordingly had before the local officers, at which the testimony taken before a State court in the controversy between these parties was, by stipulation, submitted as the testimony to be considered in this case. As a result of the hearing, the local officers decided that the land was worthless for agricultural purposes, and "chiefly valuable for fire clay deposits and the manufacture of aluminium."

The agricultural claimant appealed, and your office, by letter of November 28, 1893, reversed the judgment of the local officers, whereupon the mineral applicant prosecutes this appeal, assigning numerous errors, both of law and fact.

The testimony submitted is very unsatisfactory for any purpose, and it is especially so for the purpose of ascertaining the quantity of land claimed by the agricultural claimant, its location, or its character. There are over five hundred pages of typewritten testimony taken, as

stated above, in the trial of the case in the State court, where there were maps or plats introduced as exhibits, claiming to define the boundaries of the land, not one of which have been transmitted to this office. There is page after page of testimony descriptive and explanatory of these exhibits in connection with this controversy. Other exhibits, such as the amended location certificate, deeds of transfer, and similar documents, are referred to, but none of them accompany the record.

There is some claim made to the effect that the agricultural claimant is holding more than a quarter section of land, but I am unable to determine whether this be a fact or not, or whether the excess over one hundred and sixty acres, granting, for the sake of argument, that there is a greater amount, conflicts with the mineral claim, or in what way, or to what extent there may be adverse holdings. Whether or not it is material to decide this question at the present time, because the land is unsurveyed, may or may not be important to the mineral claimant. In any event, however, the agricultural claimant will not be permitted to take more than one hundred and sixty acres, and by his declaratory statement made and filed under the State laws of Idaho; this is the amount that he claims. So that in any event, he would be restricted to that amount.

The question as to the mineral character of the land, as presented by this testimony, is rather a novel one. By the notice of location it is claimed that the land is taken for "fire clay and kaolin and aluminium. The same is taken for the manufacture of fire bricks, tiles, terra cotta, and other useful articles."

It is conceded by both sides to this controversy that there is an immense deposit of clay on the land, and there is some testimony offered by the mineral claimant which tends to show that this clay is valuable for the manufacture of pressed brick, but no other commodity is touched upon in the testimony except that it contains alumina, from which may be manufactured commercial aluminium. The experts testifying on both sides of this controversy claim that it does not contain kaolin. I think it is shown by a fair preponderance of the evidence that alumina does not exist in paying quantities on the tract.

But be that as it may, the presence of a deposit like this would not impress a mineral character upon the land that would reserve it as mineral and exempt it from settlement and entry under the homestead laws. In other words, alumina is not such a mineral as contemplated by Congress that would exclude the land from agricultural entry.

It is a matter of common knowledge, I apprehend, that aluminium exists in more or less varying quantities in all clays throughout the country. To hold this character of land subject to mineral entry would be opening a method for the appropriation of the public land that would be disastrous to those seeking homes under the homestead laws.

For this reason your office judgment is affirmed.

SCRIP LOCATION—EQUITABLE ADJUDICATION.

MAUD W. G. BURGESS.

A pre-emption entry in which the land is paid for with surveyor-general's scrip issued under the act of June 2, 1858, and used in payment for the land under the act of January 28, 1879, may be referred to the board of equitable adjudication, where the application to locate the scrip was irregularly made for the aggregate amount thereof as one location, instead of separately for each piece of said scrip.

Secretary Smith to the Commissioner of the General Land Office, June 1, 1895. (J. I. P.)

The tract involved in this case is the SW. $\frac{1}{4}$ of Sec. 34, T. 8 N., R. 59 W., Sterling, Colorado, land district for which tract Maud W. G. Burgess filed pre-emption declaratory statement No. 25,933 June 21, 1887, alleging settlement June 14, 1887. May 2, 1888, she transmuted said filing to homestead entry No. 12,125, Denver series, on which commutation proof was made May 31, 1890.

It appears that on making commutation proof she offered in payment for said land an application to locate three pieces of surveyor-general's scrip as follows: No. 451 B, for 39.23 acres; No. 509 E., for 60.28 acres; and No. 512 E, for 60.28 acres; said scrip having been issued as surveyor-general's scrip under act of June 2, 1858, 11 Stat., 294.

The Denver office, at which said proceedings were had, accepted said scrip, and issued a certificate of entry for R. and R. No. 58, which was afterwards corrected to No. 36, as per instructions from your office.

The scrip surrendered in this case is for 159.79 acres, the difference between that and the tract entered being .21 acre which was paid for by applicant, as per receipt No. 15,422.

In view of the fact that said scrip was tendered as of one location for the whole tract, instead of three separate applications, as the law and the regulations of the Department require, your office directed, by letter of March 1, 1892, that the application as made could be amended so as to embrace the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 34, containing 80 acres, to be located with scrip No. 509 E, of 60.28 acres, leaving a balance of 19.72 acres, and that it will be necessary for the party to make payment on 19.51 acres, amounting to \$24.39, for which the receiver would issue the usual receipt, etc.

Your office further directed "that an additional application must then be made to cover the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 34, containing 80 acres, to be located with No. 512 E, for 60.28 acres, and that the balance in the area must be likewise paid for at the rate of \$1.25 per acre, for which the receiver should issue another excess receipt." In this way only two pieces of the scrip would be located, thereby saving for the owner scrip No. 451 B, which would be returned to the claimant upon her proper application therefor.

It was still further stated in said letter that if the party should prefer to make cash payment for the land, and have the scrip returned, she would be allowed to do so, upon application to this office.

September 27, 1892, the local office reported to your office that due notice of your said office letter "C" of March 1, 1892, was sent to claimant at Raymer, Colorado, and that no action had been taken in the matter; that the notice sent to her was returned to the writer, that is, to the local office, and the notice informing your office of that fact contained the letter mailed to the claimant aforesaid.

Thereafter there was filed in your office a communication from Mr. C. H. Moulton, an attorney in this city, representing the Reliance Trust Company of Denver, Colorado, in which he encloses an affidavit of Harrington Emerson, the secretary of said company, alleging that said company, on the first of August, 1890, had loaned the claimant \$390, taking as security therefor a mortgage on this land; that they had made diligent search for the claimant, in order that the requirements of the General Land Office might be complied with, but without success, and that said company was being damaged by the withholding of patent to this land. Mr. Moulton then asked that in view of the fact that the land had been fully paid for, and the further fact that the entryman, or woman, could not be found, the case be referred to the board of equitable adjudication for confirmation.

In view of the facts set forth by Mr. Moulton's letter and the affidavit of the secretary of said trust company, you modified that portion of your office letter of March 1, 1892, requiring claimant to make separate application to locate each piece of said scrip on a specific subdivision of land, and declared that that would not be insisted upon. But it was also held that there was no rule under which said entry could be referred to the board of equitable adjudication; that the law required that each piece of scrip should be located upon a specific subdivision of land, and that as that had not been done in this case, your office could not refer the matter to the board of equitable adjudication; and your office directed that the local office again notify the entryman, as well as said trust company, at their last known post-office address, of the modification of your office letter of March 1, 1892, and that unless the requirements of said letter of March 1, 1892, as modified, were complied with, the proof would be rejected, as the scrip cannot be accepted as now located.

An appeal by the Reliance Trust Company, as mortgagee, transmitted by your office letter "C" of April 23, 1894, brings the case here.

The scrip referred to was issued, as stated, under the act of June 2, 1858 (11 Stat., 294), and by the act of January 28, 1879 (20 Stat., 274), scrip issued under the act of June 2, 1858, *supra*, may be located on lands subject to sale at private entry, or in payment of pre-emption claims, and in commutation of homestead claims, in the same manner as in military land warrants. In the case of R. F. Pettigrew *et al.*

(2 L. D., 592), Commissioner McFarland, in a letter addressed to Drummond and Bradford, Washington, D. C., August 8, 1883, which letter was affirmed by the Secretary May 9, 1884, stated, with regard to scrip offered in payment for a pre-emption or commuted homestead claim, as follows:

I am inclined to the opinion that for the purpose of making payment for a pre-emption or commuted homestead claim, such scrip is money within the meaning of Sec. 2262. The language used in the act is, "shall be received in payment . . . at the rate of \$1.25 per acre."

Under the pre-emption law, land might be entered upon the payment of a price. (Sec. 2259, Rev. Stat.)

Price without further explanatory words means money.

Money has been defined to mean a legal tender, so made by law.

This scrip was made receivable in payment for lands in pre-emption cases at the price of \$1.25 per acre; it possessed all the attributes of a legal tender for this purpose. It was the price of the land.

It would appear from the above that the claimant had substantially made payment for the tract embraced in her commuted homestead entry when she tendered the scrip above described in payment therefor, and it was so accepted by the local office; that the only error or irregularity committed was that an application to locate each separate piece of scrip on a separate subdivision of the public land was not made; that instead thereof the application was made in bulk, the aggregate in said application being for 159.79 acres, and the tract so located being .21 acre in excess thereof, for which payment was duly made.

Inasmuch as the act of January 28, 1879, *supra*, authorizes the location of this scrip in the same manner as military bounty land warrants are located, it would appear that the rule made by the board of equitable adjudication concerning the location of bounty land warrants would apply equally to the location of scrip of this character. That rule, No. 16, is as follows: "That the locations, under act of 14th of August, 1848, entitled, 'An act in relation to military land warrants,' be confirmed and patents issued thereon, where the land located lies in one body, and the only objection to the location is that it consists technically of more than one legal subdivision."

I am of the opinion that said rule may be construed to embrace locations of scrip of the character herein described, and that, at any rate, Sec. 2457 of the Revised Statutes are broad enough to warrant the reference of this entry, under the facts stated, to the board of equitable adjudication. (New York Lode and Millsite Claim, 5 L. D., 513.)

Your office decision is therefore reversed, and the entry in question is hereby referred to the board of equitable adjudication for its consideration.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

RUTH *v.* UNION PACIFIC RY. CO.

When a railroad company has sold and conveyed land improperly patented to it, and received payment therefor, the right of entry by the company's grantee, under section 4, of the act of March 3, 1887, with, or without, payment of the government price of the land, will not be recognized while the patent to said land, in the name of the company, is outstanding.

The grantee of the company in such case may reconvey title to the company, and the company to the government, and so enable the Department to issue patent to said grantee under said section.

Secretary Smith to the Commissioner of the General Land Office, June 1, 1895. (W. M. B.)

This is an appeal by Mrs. Ruth from your office decision of December 21, 1893, in the case of Adaline Ruth *v.* The Union Pacific Railway Company, wherein was held for cancellation selection by said company of lots 1 and 2 of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 3 S., R. 69 W., and rejecting the said Ruth's application under the fourth section of the act of March 3, 1887 (24 Stat., 556), for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 31, and holding intact the latter's (Mrs. Ruth's) cash entry No. 16,237, as to lots 1 and 2 of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, all in Sec. 31, T. 3 S., R. 69 W., said tracts being situate in the Denver land district, Colorado.

The record before me shows that the company listed the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ December 31, 1879, and that patent issued therefor November 1, 1881; that it also listed, on May 31, 1884, lots 1 and 2 of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, which latter tracts were not patented.

The tracts above described are unoffered lands, and are within the limits of the grant to the Union Pacific Railroad Company, line of road having been definitely located May 26, 1870.

The lands involved are excluded from the operation of the grant by pre-emption filing of record made some years before definite location of line of the company's road, and which were *prima facie* valid and subsisting at time (May 20, 1870,) of such definite location; the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ patented to the company being included in the pre-emption filing of George White, made March 16, 1865, and subsisting when right under grant attached, and hence patent thereon was improperly and erroneously issued to the company.

Adaline Ruth claims under deeds executed by the company, in 1880, for a portion of the lands in controversy, and those executed in 1885 for the remainder thereof, and settlement upon, improvement of, and application made in good faith to purchase the same prior to February 4, 1893, at which date satisfactory proof, after publication, was submitted by the plaintiff as to lots 1 and 2 of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, under section 5 of the act of March 3, 1887, with issuance of final certificate; plaintiff's application to purchase the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, under section 4 of said act was rejected by your

office, for the reason that patent had been issued to the company for this tract and was outstanding.

It is shown that due notice was given to the company of your said office decision, and no appeal having been filed by the company within the time prescribed by the Rules of Practice, the decision was held to be final, in so far as regards the rights of the company in and to the land covered by that portion of plaintiff's entry which was held intact, without further proof by plaintiff.

The plaintiff, Ruth, appealed from the decision of your office so far as it rejected her application to purchase the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31 (patented to the company), and final proof thereon, under provision of section 4 of the act, above referred to, basing said appeal—

on the ground of (alleged) error in said decision in not accepting her offer to reconvey the land to the United States and thereupon issuing a patent to her, without payment of purchase money, as provided by said 4th section.

From the facts as they are disclosed by the record in this case, it is evident that under a proper construction of the law as stated in the case of *Malone v. Union Pacific Railroad Company* (7 L. D., 13), that patent for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, by virtue of pre-existing valid claim upon the same, adverse to that of the company, was irregularly and erroneously issued to the company, and that the preliminary steps looking to the cancellation of such patent have already been taken; until the same is lawfully vacated, and the land covered thereby restored to the public domain, and made subject to entry, this Department has no jurisdiction over the tract.

It is insisted by the plaintiff that a demand having been made upon the company for a reconveyance of the land in controversy, and refused, that it makes no matter on what grounds the refusal was made, since it is evident, as she alleges, "from the evidence in the case that it was impossible for the company to comply with the demand for it had already conveyed to Mrs. Ruth the title it acquired under its patent from the government;" and further that "it is unreasonable to suppose that Congress, in passing the act, intended to require that which was impossible to do; hence it is evident that it is the intention of the law that where railway companies have parted with their title to any lands their grantees may make the reconveyance demanded."

When a railroad company has sold and conveyed land improperly patented to it, and received payment therefor, the right of entry by the company's grantee, under section 4 of the act of March 3, 1837, with, or without, payment of the government price of the land, will not be recognized, while patent to said land in the name of the company is outstanding.

In such case it is not proper to consider and pass upon the question of payment or non-payment by the entryman, until the government has secured title and jurisdiction over the land.

If Mrs. Ruth will reconvey to the company, so that the company may reconvey to the government, I see no reason why patent should not

then issue to her, in accordance with the provisions of section 4 of the act of March 3, 1887 (24 Stat., 556), and demand should then be made of the company for the value of the land, as provided by said section.

For the foregoing reasons, your office decision is hereby affirmed.

COMMUTATION OF OKLAHOMA HOMESTEAD FOR TOWNSITE-SCHOOL FUND.

Section 22, act of May 2, 1890, contemplates the payment to the town, for school purposes, only such sums as may be paid in commutation of homestead entries for townsite purposes on the purchase of the land at the rate of ten dollars per acre.

Secretary Smith to the Commissioner of the General Land Office, June 1, 1895.
(J. I. H.) (G. B. G.)

I have this day caused to be issued, and transmit herewith, a certificate addressed to the Secretary of the Treasury, stating that there is due to the city of North Enid, Oklahoma Territory, the sum of \$1,496.00 for school purposes, under the provisions of the act of Congress approved May 2, 1890 (26 Stat., 81).

By your office letter of April 15, 1895, my attention is called to the fact that the records of this Department show that the disbursing officer received \$1,500.00 from William M. Beavers in commutation of his homestead entry for the NE. $\frac{1}{4}$ of Section 32, T. 23 N., R. 6 W., Oklahoma Territory, and that said amount was deposited in the United States Treasury as shown by certificate of deposit, No. 12077, dated June 1, 1894. The tract commuted contained 149.60 acres, and the purchase price having been at the rate of \$10 per acre under the statute it would appear that the correct amount due on the commutation of said entry is \$1,496.00, and that therefore \$4.00 in excess of this amount was paid by the said Beavers. It is suggested that the town of North Enid is only entitled under the statute to \$1,496.00, the value of the land patented, instead of \$1,500.00, the amount paid for the same. Section 22 of the act referred to provides, among other things, "And the sum so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipality when organized to be used by them for school purposes only." In view of the fact that the homesteader would be entitled to repayment of the \$4.00 excess paid on said entry, I am of opinion that the statute contemplated the payment to the town for school purposes only of such sums as may have been paid in commutation of homestead entries for townsite purposes as would be realized by the sale of the land at the rate of \$10.00, and that therefore the said town is only entitled to the sum of \$1,496.00.

You are hereby instructed to state an account in favor of said town of North Enid for the amount above named, said money to be charged to the fund in the Treasury Department designated as "Proceeds of townsites for school purposes in Oklahoma Territory."

PRE-EMPTION ENTRY SECTION 2260 R. S.

JAMES CASH.*

Suit requested for the recovery title where it appears that patent has issued to a pre-emptor that removed from land of his own in the same State to establish his residence on the pre-emption claim.

Secretary Smith to the Attorney-General, June 4, 1895.

(J. I. H.)

(J. L. McC.)

I transmit herewith copy of a communication from the Commissioner of the General Land Office, with the enclosures therein referred to, recommending that a request be made for the institution of suit to vacate the patent issued on September 11, 1890, to James Cash under his pre-emption cash entry No. 16, made February 20, 1893, for the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 3, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 4, T. 35 N., R. 8 W., Durango land district, Colorado.

The ground upon which said suit is recommended is that the defendant removed from land of his own in the same State when he took up his residence on his pre-emption claim.

From the statements contained in the letter of the Commissioner and the report of the special agent there would appear to be no room for doubt that such was the fact; and under the rulings of this Department, uniformly adhered to since the date of the passage of the homestead act, the pre-emption entry of Cash was in violation of law. I have therefore the honor to request that, if in your opinion it can be maintained, suit be instituted to secure a cancellation of the patent issued to said James Cash for the land hereinbefore described.

INDIAN LANDS—SPOKANE INDIANS—FINAL PROOF.

OBED JACOBS.

The fourth article of the agreement made with the Spokane Indians March 15, 1887, does not relieve said Indians from any requirement of the act of July 4, 1884, in the matter of final proof except as to residence on the land.

Assistant Attorney-General Hall to the Secretary of the Interior, May 15, 1895.

On April 29, 1895, Obed Jacobs, a Spokane Indian, made a homestead entry for certain lands in Sec. 30, T. 26 N., R. 41 E., in the State of Washington.

On the 15th day of March, 1887, an agreement was made between the United States and the Upper and Middle Bands of Spokane Indians, for the cession to the United States of a portion of their

*The letter of January 22, 1895, 20 L. D., 64, was recalled by Acting Secretary Sims, May 23, 1895.

lands, which was ratified by act of Congress, approved July 13, 1892 (27 Stat., 139).

Jacobs failed to pay on demand by the local officers the proper charges for advertising and making final proof of his homestead entry, claiming that under the fourth article of the aforesaid agreement he is entitled to patent for said lands, without making final proof. That article reads as follows:

It is further agreed that in case any Indian or Indians, parties hereto, have settled upon any of the unoccupied lands of the United States outside of said reservation, and have made improvements thereon with the intention of perfecting title to the same under the homestead, pre-emption, or other laws of the United States, and residing on the same at the date of the signing of this agreement, he or they shall not be deprived of any right acquired by said settlement, improvement or occupancy by reason of signing this agreement or removal to said Coeur d'Alene Reservation, and said tract or tracts of land shall continue to be held by said parties, and the same patented to them by the United States.

My opinion is that said article merely reserved the right of Jacobs to his homestead should he remove therefrom and go on the Coeur d'Alene Reservation, the same as if he had continued to reside thereon as required by the land laws of the United States. It is my opinion, further that Jacobs will be required to make final proof before patent can issue and he should comply in all respects with the requirements of the act of Congress approved July 4, 1884 (23 Stat., 96), except in the matter of residence upon the land.

Approved,

HOKE SMITH,

Secretary.

RAILROAD RIGHT OF WAY—TRAM ROAD—SECTION 2288, R. S.

INSTRUCTIONS.

Section 2288, R. S., as amended by the act of March 3, 1891, authorizing settlers to execute conveyances of lands embraced within their claims for "railroad" right of way purposes, is applicable to "tram roads," used in the business of mining, quarrying, cutting timber, and manufacturing lumber.

Secretary Smith to the Commissioner of the General Land Office, June 1,
(J. I. H.) 1895. (F. W. C.)

I am in receipt of your office letter of April 16, 1895, presenting for my consideration certain correspondence involving the construction of section 2288 of the Revised Statutes, as amended by section three of the act of March 3, 1891 (26 Stat., 1095).

As amended said section is as follows:

Sec. 2288. Any *bona fide* settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim.

The question presented by this correspondence is as to whether said section can be construed to apply to tram roads, canals, and reservoirs used by citizens engaged in the business of mining, quarrying, cutting timber, or manufacturing lumber.

By the act of January 21, 1895, the Secretary of the Interior is authorized and empowered to permit the use of a right of way through the public lands of the United States for tram roads, canals, or reservoirs, constructed by citizens or associations of citizens of the United States engaged in the business of mining, quarrying, cutting timber and manufacturing lumber.

In the construction of this statute it has been held that the permission to use the public land under this act terminates with the disposal of it by the government, and the persons so taking the land acquire it free from any charge by reason of the permission granted under said act.

Companies interested in securing the benefits of said act of January 25, 1895, are desirous of acquiring the right of way from settlers and the question presented is whether it is permissible, under said section 2288 of the Revised Statutes above referred to.

I think that the word "railroads" is used in a generic sense in the statute, and includes all kinds of roads over which vehicles pass upon rails. I am therefore of the opinion that the right of way can be acquired under said section, and that the settler thereon, by making such agreement, will not avoid his entry.

The papers forwarded with your letter are herewith returned, and you will advise the parties accordingly and issue such further instructions as in your opinion may be necessary for the information and protection of settlers holding the land, along the line of proposed tram ways or canals, contemplated being built under the provisions of the act of January 21, 1895, *supra*.

STATE SELECTION—LANDS RESTORED TO PUBLIC DOMAIN.

STATE OF MISSISSIPPI.

The right of the State under the act of June 20, 1894, to "select out of the unoccupied and uninhabited lands of the United States" lands for university purposes, from those restored to the public domain by the act of March 2, 1895, is limited to such lands as were restored by said act free from any provision therein requiring their disposal in a special manner. The right of selection, therefore, does not extend to the lands restored by said act that were by the terms thereof set apart for entry under the townsite laws.

Secretary Smith to the Commissioner of the General Land Office, June 3,
(J. I. H.) 1895. (G. B. G.)

I have carefully examined into the question presented by the application of the governor of the State of Mississippi to select lands recently

restored to the public domain in the State of Mississippi that were embraced within naval reservations.

The act of Congress approved June 20, 1894 (28 Stat., 94), under which the governor of the State of Mississippi claims the right to make this selection, is as follows:

That the governor of the State of Mississippi be, and he is hereby, authorized to select out of the unoccupied and uninhabited lands of the United States within the said State twenty-three thousand and forty acres of land, in legal subdivisions, being a total equivalent to one township, and shall certify the same to the Secretary of the Interior, who shall forthwith, on receipt of said certificate, issue to the State of Mississippi patents for said lands: *Provided*, That the proceeds of said lands, when sold or leased, shall be and forever remain a fund for the use of the University of Mississippi.

The lands in question were restored to the public domain by the act approved March 2, 1895 (Pamph. laws, 3d sess., 53d Cong., p. 814), which act, after providing for a certification by the Secretary of the Navy to the Secretary of the Interior of the lands specified, reads as follows:

and upon such certification the tracts of land described therein shall be duly restored to and become a part of the public lands of the United States and a preference right of entry for period of six months from the date of this act shall be given all bona fide settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this act: *Provided*, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry; and such payment may, at the option of the purchaser, be made in five equal installments at times and at rates of interest to be fixed by the Secretary of the Interior: *Provided*, That so much of the said lands as are situated on Back Bay, near the city of Biloxi, in the State of Mississippi, shall be disposed of under the townsite law and not as agricultural lands.

The act of June 20, 1894, *supra*, under which the selection is made, provides that the governor "is authorized to select out of the unoccupied and uninhabited lands of the United States within the said State." I find nothing in this act which will prevent the State of Mississippi from selecting such of the "unoccupied and uninhabited" lands of the United States as were restored to the public domain, by the act of 1895 (*supra*) except the lands which the act provides shall be disposed of in a special manner.

It is contended by counsel for the State of Mississippi that the second proviso to the act approved March 2, 1895, *supra*, does not relate to the body of the act and only limits the immediately preceding, or first, proviso. The second proviso is as follows, "*Provided*, That so much of the said lands as are situated on Back Bay, near the city of Biloxi, in the State of Mississippi, shall be disposed of under the townsite law and not as agricultural lands."

I do not regard this contention as sound. The body of the act restores these lands to the public domain, and, of course, subject to

entry under the homestead law. The first proviso does not confer any right of entry under the homestead law, but merely regulates the price the entryman is required to pay for the lands taken by him. There is no other office, in my judgment, for the second proviso to perform except as a limitation upon the body of the act, that is, upon the disposition of the lands therein restored to the public domain.

This being true, it may be seriously questioned if the lands within the scope of the second proviso have ever been restored to the public domain. The body of the act and said proviso being read together, a fair and altogether plausible construction would warrant the conclusion that they are still in reservation for a specific purpose, that is, for entry under the townsite laws. True, they have been taken out of the reservation for naval purposes, and the jurisdiction thereof transferred from the Secretary of the Navy to the Secretary of the Interior, but they are now, in effect, in reservation for townsite purposes, and have surely not been restored to the public domain as fully and effectually, as if a specific disposition had not been provided for.

It is further contended by counsel for the State that if said proviso has any relation to or connection with the body of the act it does not in legal force and effect exclude the right of the State to select any of said lands by virtue of the act of 1894; and in presenting this view counsel argues that the language of the act of 1894, to wit, "select out of the unoccupied and uninhabited lands of the United States," confers upon the State the right to select these lands if they are unoccupied and uninhabited, notwithstanding the act of 1895 provides that certain of these lands shall be disposed of under the townsite law.

In my judgment, the language, "out of the unoccupied and uninhabited lands of the United States," does not confer any greater right upon the State of Mississippi than if the term "public lands" had been used in the act; that is, lands open to entry under the land laws of the United States. Any other ruling would permit the State to select any lands of the United States within her borders that have been placed in reservation by the President for any public purpose, if the same were not actually occupied or inhabited at the date of selection. Surely, Congress could not have intended to confer any such right upon the State of Mississippi. See *Leavenworth &c. Co. v. United States* (92 U. S., 741).

Further, if the contention of counsel be true, that the only limitation upon the State's right of selection is as to unoccupied and uninhabited lands, the State could select any known mineral land within the State of Mississippi which is not occupied and inhabited at the date of the selection. Yet the courts and the Department have uniformly held that mineral lands are not conveyed by a grant which is silent as to excepting minerals; that the well-known policy of the government to dispose of mineral lands under special laws serves to except them from a grant however general in terms. Nothing short of a specific grant of mineral lands in a granting act will serve to convey such lands.

In my opinion, the State is restricted to selecting from the unoccupied and uninhabited public lands of the United States, within that State, which are open to entry under the general land laws.

It is contended by counsel for the State that the words in the second proviso of the act of 1895, to wit, shall be disposed of "under the townsite law and not as agricultural lands," indicate merely that the settlers under the homestead law should not take such lands, and inasmuch as these lands are "unoccupied and uninhabited," they may be selected by the State of Mississippi.

I think this contention unsound. The second proviso to the act of March 2, 1895, reads that "so much of said lands as are situated on Back Bay, near the city of Biloxi, in the State of Mississippi, shall be disposed of under the townsite law, and not as agricultural lands."

Public lands are divided into two classes, really; agricultural and mineral. There are subdivisions of the agricultural class; that is, several modes of entry, such as homestead, timber, stone, and townsite entry. All such lands may be taken to satisfy grants, except such as are specially disposed of in some other way.

The meaning of the language "shall be disposed of under the townsite law and not as agricultural lands," is that the lands shall not be treated as public lands subject to entry under the general laws, nor can such lands be selected to satisfy grants, but shall be disposed of under the townsite law. The State's right could not attach to any lands until selection is made. Selection could not have been made until the lands were restored to the public domain, and the act which placed any of these lands in a situation to be selected by the State, expressly provided that certain of the lands should be disposed of in a certain manner, under the townsite law.

It is my judgment, therefore, that the State of Mississippi is not authorized to select any of said last mentioned lands. I therefore direct that the State of Mississippi be authorized to select any of the "unoccupied and uninhabited lands" within the late naval reservation, except the lands directed to be disposed of under the townsite law by the act of March 2, 1895.

You will prepare a list of selections made by the governor of the State of Mississippi, in accordance with this letter, and send it forward for my approval.

RAILROAD GRANT—LANDS EXCEPTED—HOMESTEAD.

NORTHERN PACIFIC R. R. Co.

Land embraced within a homestead entry, at the date of the granting act, is excepted from the operation thereof, whether said entry has been perfected at such time or not.

Secretary Smith to the Commissioner of the General Land Office, June 5,
(J. I. H.) 1895. (F. W. C.)

With your office letter of November 10, 1894, were forwarded the papers in the case arising upon the rule laid upon the Northern Pacific Railroad company, to show cause why demand should not be made of it under the provisions of the act of March 3, 1887 (24 Stat., 556), to reconvey certain tracts therein described, amounting to 574.30 acres, in the State of Washington, shown to have been erroneously patented on account of its grant.

These lands are shown to have been embraced in homestead entries, previously made, at the date of the passage of the joint resolution of May 31, 1870 (16 Stat., 378), making the grant for the portion of the company's line opposite which these lands are situated.

These entries were subsequently canceled and the lands were patented on account of the grant April 8, 1880.

Under the authority of the decision of the United States supreme court in the case of the Northern Pacific Railroad company *v. Bardon* (145 U. S., 535), it was held that these tracts were excepted from the company's grant and that the patenting of the same on account thereof was error.

It is argued at some length by counsel for the company that the decision in the *Bardon* case has no application to the facts presented in this case, for the reason that these entries were only original entries and not completed entries as was the entry by Robinson considered by the court in the *Bardon* case.

Whatever doubt may have existed in the matter is fully removed by the decision in the case of *Joel Parker Whitney v. Frank C. Taylor*, decided by the United States supreme court on April 29, 1895 (157 U. S. 85).

In this decision the court, after referring to the decisions in the case of *Kansas Pacific Railway v. Dunmeyer* (113 U. S., 629); *Hastings and Dakota R. R. Co. v. Whitney* (132 U. S., 357); *Bardon v. Northern Pacific R. R. Co.* (*supra*), and *Newhall v. Sanger* (92 U. S., 761), held as follows:

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government and has not been cancelled or set aside, the tract in respect to which that claim is existing is

excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. 'It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard. The reasoning of these cases is applicable here. Jones had filed a claim in respect to this land, declaring that he had settled and improved it, and intended to purchase it under the provisions of the pre-emption law. Whether he had in fact settled or improved it was a question in which the government was, at least up to the time of the filing of the map of definite location, the only party adversely interested. And if it was content to let that claim rest as one thereafter to be prosecuted to consummation, that was the end of the matter, and the railroad company was not permitted by the filing of its map of definite location to become a party to any such controversy. The land being subject to such claim was, as said by Mr. Justice Miller, in *Railway Company v. Dunmeyer*, *supra*, "excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds."

It might be here stated that in the decision in the case of said company *v. Smalley* (15 L. D., 36), it was held that land embraced in a pre-emption claim at the date of the grant was, under the decision of the court in the *Bardon* case, excepted from the grant, and this case has since been followed and adhered to in many adjudications. Counsel of the company has recently filed an additional brief and without disputing the force of the authorities cited urges that sound administrative policy fully justifies the discharge of the pending rule.

Under the act of March 3, 1887 (*supra*), it becomes the duty of the Department (1) to adjust all unadjusted railroad grants in accordance with the decisions of the supreme court, and (2) where it shall appear that lands have been erroneously certified or patented on account of such grants, to demand from the company receiving the same a relinquishment or reconveyance of the land to the United States.

I must therefore direct that demand be made of the Northern Pacific Railroad company to reconvey the lands in question to the United States, and at the expiration of the time (ninety days) allowed by the statute within which to comply with such demand, that report be made of the proceedings taken to the end that such further action may be taken under the act of Congress as the facts then presented may justify.

~ Herewith are returned the papers for the purpose stated.

PRACTICE—RULE 48—SOLDIERS' ADDITIONAL HOMESTEAD—
HEARING.HAMRICK *v.* BUTTS ET AL., AND HAMRICK *v.* SHEPPARD ET AL.

Failure to appeal from a decision of the local office will not preclude the General Land Office from an examination of the facts in a case, where fraud or gross irregularity is suggested on the face of the papers.

A soldier's additional homestead entry made under a contract to sell the land on the issuance of final certificate should be canceled as speculative and fraudulent.

The acts of March 3, 1893, and August 18, 1894, do not contemplate the perfection of a soldier's additional homestead entry, made in person by the soldier and without a certificate of right.

The right of the government to test the validity of an entry in a direct proceeding is not defeated by its failure in a collateral proceeding to ascertain the character of said entry.

Secretary Smith to the Commissioner of the General Land Office, June 5, 1895. (W. M. B.)

This controversy involves the entire NE. $\frac{1}{4}$ of Sec. 18, T. 8 S., R. 36 W., Oberlin, Kansas, land district.

The record shows that the above described quarter section was taken up in the following manner, to wit: Robert L. Butts made commuted homestead cash entry No. 6781 on July 10, 1888, on soldier's additional homestead entry No. 13,137 made the same day (July 10, 1888,) for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 8 S., R. 36 W., 120 acres (Oberlin, Kansas); and that John Sheppard by soldier's additional homestead entry No. 13,136 (Oberlin, Kansas), July 10, 1888, final certificate same day (July 10, 1888), for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 8 S., R. 36 W., 40 acres.

For the sake of convenience and a better understanding of this case a tabulated statement of all the entries alleged to have been made by Butts and Sheppard is given below:

ROBERT L. BUTTS.

Original H. E. No. 807, Booneville, Mo., May 31, 1865, C. E. No. 30668, Springfield, Mo., Dec. 6, 1869, for NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 21, T. 31, R. 7, 40 acres, patented March 30, 1870.

Soldier's (first) additional H. E. No. 2709, March 12, 1879, F. C. No. 1551, March 12, 1879, Taylor's Falls, Minn., for Lots 3 and 4, Sec. 7, T. 42, R. 27, 121.47 acres, not patented.

Recapitulation of entry in excess of what Butts is alleged to be entitled to.

Soldier's second additional H. E. No. 13137, July 10, 1888, C. E. 6781, July 10, 1888, Oberlin, Kan., for W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 18, T. 8 S., R. 36 W., 120 acres, being one of the tracts now in controversy.

JOHN SHEPPARD.

Original H. E. No. 3003, November 23, 1869, F. C. No. 2965, June 19, 1876, Springfield, Mo., for S. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 31, T. 34, R. 17, 78.82 acres, patented July 30, 1878.

Soldier's (first) additional H. E. No. 2081, January 14, 1878, F. C. No. 608, January 14, 1878, Marysville, Cal., N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 30, T. 25 N., R. 5 W., 80 acres, patented November 25, 1879.

Recapitulation of entry in excess of what Sheppard is alleged to be entitled to.

Soldier's second additional H. E. No. 13136, Oberlin, Kansas, July 10, 1888, F. C. No. 1355, July 10, 1888, for SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 18, T. 8 S., R. 36 W., 40 acres, being one of the tracts now in controversy.

It is alleged by counsel for the defense that the entries made at Taylor's Falls and Marysville were initiated under fraudulent powers of attorney.

The record shows that Butts and Sheppard left the State of Wisconsin and went direct to Oberlin, Kansas, and made the entries at that place, above described, without ever having seen the land so entered, and sold the respective tracts to L. L. French, the one filed upon by Butts for \$600, and the one filed upon by Sheppard for \$200. It appears that the former paid the regular government price for the land entered by him, as also the entry fees, but subsequently petitioned that the purchase money be returned to him; while it seems that Sheppard received final certificate upon his entry, without paying anything on the land, save the fees incident to the entry thereof.

Neither Butts nor Sheppard, as shown by the record, could write or sign his name, and it appears that French was present and witnessed the execution of the entry papers in each case. French thereupon purchased the land embraced in both entries, and thereafter sold it to the Kansas Town and Land Company, in which corporation he was a stockholder.

It appears from the record that John C. Hamrick made application in due time to contest the above mentioned second additional homestead entries, made July 10, 1888, upon the charge that the same were fraudulent in this, that by previous agreement on the part of said Butts and Sheppard with L. L. French, to make said entries, and final proof thereon, and immediately thereafter to sell and transfer the land covered by their respective entries to the said French, and that they did so sell and transfer the tracts in question the same day the entries and final proofs were made, said entries having been made upon land never visited or examined by the entryman prior to the time of filing thereon.

Hamrick's application to contest, upon the charge alleged in the first affidavit of contest, was rejected upon the ground stated in the decision of your office in words as follows: "It was held by this office February 10, 1888, in the case of Bradbury v. Dickinson, Lamar, Colorado, that a prior agreement to sell would not invalidate a soldier's additional homestead entry or would not raise the presumption of fraud."

Upon motion for reconsideration, based upon newly discovered evidence, and application to contest, a hearing was ordered by your office, with instructions to the register and receiver that the hearing be confined exclusively to the questions raised by said motion, which alleged that Butts and Sheppard, respectively, had exhausted their soldier's additional right prior to the entries in question, the one, to wit: on March 12, 1879, at Taylor's Falls, Minnesota, for 121.47 acres; and the other on January 14, 1878, at Marysville, California, for 80 acres, as shown in the tabulated statement, *supra*.

As the result of such hearing the local officers found in favor of the defendants Butts and Sheppard, and recommended that their respec-

tive entries, made at Oberlin, be held intact; but your office reversed their joint decision in each case, and held that said defendants had exhausted their soldier's additional rights, as above alleged, and held both of said Oberlin entries for cancellation.

From your said office decision the defendants appealed, and contend that as Hamrick did not appeal from the decision of the local office, under Rule 48 of Practice, that the government is bound by the finding of facts made by the local office; and further, that your office erred in its conclusions of law upon the facts.

The contestant having failed to avail himself of his right of appeal under the law, the matters involved will survive between the government (being always a party in interest) and the appellants, and under subdivision one of said Rule 48, "where fraud or gross irregularity is suggested on the face of the papers," as in the case at bar, the finding of fact by the local office may be inquired into again.

The testimony (which is voluminous and made up solely of depositions) in the case, upon which the decision of the local office, and the adverse decision of your office, are based, has been carefully considered and weighed by me.

Many of the facts material to the issues in the two cases at bar (which are consolidated for the reason given in your office decision) as related in your said office letter of April 24, 1893, are deemed to be so sufficiently full as to need no further recital herein.

And there appears to be no disagreement respecting the recitals by your office in regard to any important fact in either case, according to the admission of counsel for the defendants, as evidenced by the following language:

While it states substantially the undisputed evidence produced at the hearing as ordered, yet it either fails to comprehend the issues, or sets the evidence aside for some uncertain conclusions made by its office in 1884 and 1885, upon Butts' application to have the Taylor's Falls entry declared fraudulent.

It is strenuously contended by counsel that as Hamrick charged that the Taylor's Falls and Marysville entries exhausted the soldier's additional right of Butts and Sheppard, and that since the government takes the place of Hamrick, the burden of proof is upon the government to demonstrate the validity or invalidity of these entries.

Such contention might be admitted as correct, were it not for the fact that the entry papers made out a *prima facie* case against each of the defendants respecting the genuineness of the Taylor's Falls and Marysville entries, which said entries being of record, and appearing regular in all respects, shifts the burden of proof to Butts and Sheppard, and not to the government, to demonstrate their invalidity.

The defendants, however, submit testimony for the purpose of showing that the powers of attorney, by virtue of which the entries were made, were not executed by them. The testimony shows that Butts and Sheppard, as hereinbefore stated, could neither write nor sign their

names, which fact, as in the case of Butts, taken in connection with his sworn statement, that the Taylor's Falls entry was made by virtue of forged powers of attorney, would tend to shift the burden of proof upon the government to establish the validity of the said entry. The force of that rule, however, becomes somewhat impaired, when it is remembered and taken into consideration that the papers used in making the Taylor's Falls entry were signed and executed in all respects with what appears to be *fac simile* signatures, as those used in making his soldier's original homestead entry at Booneville, Missouri. It is not clear to my mind, from all the evidence before me, that the power of attorney used was forged; there remains doubt upon the subject. This particular branch of the question—that of forgery—is too fully discussed in the exhaustive decision of your office to need further comment herein upon that particular point.

The hearing had for the purpose of determining the real status of the Taylor's Falls and Marysville entries, with a view of showing that the entrymen had thereby exhausted their soldier's additional right prior to the filings made July 10, 1888, was held at Oberlin, Kansas, a great distance from the points in Minnesota and California, where the entries in those States were made. The distance being so great, it was not reasonable to suppose that the personal attendance of witnesses could be secured for the purpose desired, and the issues involved were determined, for the most part, upon testimony contained in affidavits of persons residing in the States of Missouri and Kansas. No witnesses were put upon the stand at the hearing, and consequently the benefits to be obtained from a full and thorough direct and cross-examination of witnesses could not be had, in view of which fact, and the peculiar and unusual circumstances connected with the Taylor's Falls and Marysville entries, it was not possible, with any degree of certainty or correctness, upon the testimony submitted, to determine whether or not those entries were valid or otherwise.

Hamrick's right to contest the Oberlin entries upon the charge of an agreement, made prior to the date of the entries, to sell the land subsequent thereto, was denied him, for the reason, as stated, that your office had previously held that such an agreement would not invalidate an entry, made in the exercise of a soldier's additional homestead right.

But it has been well settled by the rulings of this Department that the privilege, under the statute, to make such an entry is simply and purely a personal right, and it was error in your office to hold, as it did, in the case of *Bradbury v. Dickinson*, that a prior agreement to sell would not raise the presumption of fraud. Opposing that view is the rule laid down in the case of *Dennis v. Ingalls* (19 L. D., 163, syllabus), wherein it is held that—

a soldier's additional homestead entry made in pursuance of a contract to sell the land on the issuance of final certificate should be canceled as speculative and fraudulent.

Even should the Taylor's Falls and Marysville entries be proven to be fraudulent, and therefore not properly chargeable to Butts and Sheppard, still it does not follow that the entries made at Oberlin on July 10, 1888, should be allowed, if found to be defective and invalid under the rule laid down the case last above cited.

Neither the entrymen, transferee, or present owners can claim any relief under the act of March 3, 1893 (26 Stat., latter part second paragraph, p. 593), to be found in the following language:

And provided further, That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land.

Nor can they claim any protection under provision of the act of August 18, 1894 (Acts 2nd Sess., 53d Congress, p. 397), in the following words:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office and section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions, of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of *bona fide* purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved and patent shall issue in the name of the assignees.

The provisions contained in those portions of the acts above quoted were intended to protect only such entries as were made or initiated upon certificates of right issued by the General Land Office, upon the conditions therein named. The first was intended to protect entries made under certificates "found erroneous or invalid," where the entry thereunder was made in good faith and the entryman paid the government price for the land, there being no "adverse claimant."

The latter act had for its object the legalizing and holding intact all entries made by *bona fide* purchasers, for value, under soldier's additional homestead certificates, issued as therein prescribed.

There is nothing contained in either act which, upon a most liberal construction thereof, can be construed in aid of, or as validating the entries made by Butts and Sheppard in person, and without any certificate of right, on July 10, 1888. Before making his entry Butts applied for a certificate of right, which was denied him by the General Land Office for the reason that one had already been issued in his name, under which the Taylor's Falls entry had been made, and which Butts had represented to be fraudulent. Permission was given him, however, to make a filing for the purpose of testing his right to make a soldier's additional homestead entry.

Whatever right Butts and Sheppard may have had to make a soldier's additional homestead entry, still under the law they could only exercise that right with *bona fide* intention of securing the land covered thereby for their sole use and exclusive benefit, and not for the purpose of speculation.

The summary manner in which the tracts involved were entered and sold, without even having been seen or examined by the entrymen, taken in connection with other unusual circumstances connected with said entries raises too strong a presumption of the *mala fides* of said entrymen to warrant the allowance of the entries without further investigation into or examination thereof.

I have fully considered and carefully weighed all evidence disclosed by the record in these cases, and I find it impossible, upon the testimony submitted, to arrive at any intelligent and satisfactory conclusion respecting the true status of the Taylor's Falls and Marysville entries. Though these said entries should turn out to be fraudulent, still it does not necessarily follow that the Oberlin entries, as already stated, were regular and valid.

A failure by this Department to be able to ascertain and determine—upon testimony submitted at a hearing ordered by your office for such purpose—whether Butts and Sheppard exhausted their soldier's additional homestead rights by the entries alleged to have been made by them in Minnesota and California, does not preclude the government from the right to impeach the validity of the Oberlin entries by a direct proceeding (a collateral one for such purpose having been inconclusive in my judgment) against the same, where the right of procedure in such manner had been improperly denied by your office, by virtue of a misapprehension of the law, where the facts in the record raise so strong a presumption of fraud, as is apparent in the two cases at bar.

Being unable, upon the evidence disclosed by the record, to concur in and affirm your office decision, a hearing, under the peculiar circumstances surrounding this case, of the character above indicated, appears to be the only alternative left, to settle the questions involved.

For the foregoing reasons, and the ground upon which the rule in the case of *Daniels v. Ingalls* is based, you will order a hearing to be had at the Oberlin, Kansas, land office, respecting the validity or fraudulency of the entries in question and made thereat, taking the necessary steps to have the government properly represented at such hearing by an agent thereof.

Your office decision is so modified.

CLASSIFICATION OF MINERAL LANDS—ACCOUNTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, June 6, 1895.

To the Commissioners to classify Mineral Lands, and to the Registers and Receivers, United States Land Offices at Helena, Bozeman and Missoula, in Montana and Coeur d'Alene, in Idaho.

Referring to departmental circular of instructions dated April 13, 1895, you are advised that so much of said circular as is contained in section 11 which directs that reports as to service of and the amounts due each member of the respective boards shall be filed with the receiver for the land district in which they are appointed, and by him transmitted to the Secretary of the Interior, is hereby modified and the following is substituted in lieu thereof, viz:

That the chairman and secretary of their respective board shall submit to the Commissioner of the General Land Office, on official blanks, a weekly report showing daily service of each member of said board. (It is imperatively necessary that weekly reports shall be full and complete, so as to furnish satisfactory evidence that each member has been officially engaged during each day for which pay is claimed.)

Salary will be disallowed for all time not so accounted for.

Each member of a board will on the last day of each month prepare on official blanks an account for such amounts as may be due as compensation for services rendered, during the month showing particularly the days for which compensation is claimed.

The account must in every instance be receipted to the disbursing clerk of the department in blank.

Also designate under your signature where the draft should be sent.

The accounts must be forwarded direct to the Commissioner of the General Land Office, who will audit and approve same for payment.

Very respectfully,

HOKE SMITH,
Secretary.

MARTIN HENSLEY.

Motion for review of departmental decision of January 30, 1895, 20 L. D., 95, denied by Secretary Smith, June 6, 1895.

PRACTICE—AFFIDAVIT—ATTORNEY—OFFICER.

Overruled so far as in conflict,
 WERDEN *v.* SCHLECHT ET AL. *24 L. R. 45-*

The affidavit of a party taken before his attorney, as notary public, will not be accepted by the Department.

An attorney will not be recognized in a case where it appears that he is an officer of the Department.

Secretary Smith to the Commissioner of the General Land Office, June 6, 1895. (A. E.)

This case was decided by the Department on December 3, 1894, Louis Schlecht and L. V. McNutt both being claimants for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 26, Tp. 39, R. 6 E., Wausau, Wisconsin. The tract was portion of reservoir lands restored to entry by the act of June 20, 1890 (26 Stat., 169). The third section of this act provided that any person who entered upon or occupied said lands before the same were opened to settlement, would not be permitted to enter or acquire any title thereto.

In the decision rendered by the Department on December 3, 1894, the land in controversy between Schlecht and McNutt was awarded to Schlecht because of priority of settlement.

On January 16, 1895, McNutt filed a petition for a rehearing. In this McNutt alleged that he could show from evidence which he had discovered since the hearing, that Louis Schlecht was upon the reservoir lands in violation of the act restoring the same. In support of this allegation McNutt filed the affidavits of Augustus Nolan, Alonzo Winslow, and Thomas J. Loughlin.

Nolan states in his affidavit that in the month of November, 1890, he met one who was introduced to him as William Allen, a surveyor, who lived at Wausau, Wisconsin, on the water reserve lands in Wisconsin; that said Allen was accompanied by a man whom deponent afterwards was led to believe was Louis Schlecht. Winslow states in his affidavit that in November, 1890, he and Augustus Nolan met Louis Schlecht and one William Allen on the water reserve lands; that he introduced said Schlecht and said Nolan, and that he, the said Schlecht, is the party who Nolan states in his affidavit accompanied said Allen. Loughlin states in his affidavit that from a description given him by Augustus Nolan of the person that he (Nolan) saw on the water reserve lands in November, 1890, in company with William Allen; that it is his opinion that said party was Louis Schlecht.

On this showing the Department, on February 16, 1895, directed your office to notify the attorney for McNutt to serve copies of all papers filed in the motion for rehearing, including that order, and to allow Schlecht thirty days within which to show cause why the prayer of the petitioner should not be granted.

Your office now transmits, under date of April 29, 1895, twelve affidavits and an argument filed in behalf of Schlecht by his attorneys, Mylrea and Marchetti.

The papers in the case are herewith returned, for two reasons: *First*, While the taking of the affidavit of a client by the attorney prosecuting his claim has been recognized in several States, including the State in which this case arose, the weight of authorities is largely against it, and in this case the Department can not sanction it. *Second*, The records of this Department show that Louis Marchetti, who is the same person acting as attorney and notary for Schlecht, was on September 2, 1893, confirmed as register of the land office at Wausau, Wisconsin, and has ever since that date, and is now holding said office.

Acting as attorney in cases before a department of which he is an officer can not be allowed, and you will so inform him.

This irregularity on the part of the attorney should cause no prejudicial opinion to be formed respecting the claim of Schlecht, or in any wise infringe upon his rights in the premises; therefore, you will accord him thirty days in which to retain other counsel, and to secure new affidavits executed before a notary other than his present or future attorneys. On the serving and filing of these, the issue raised by the petitioner McNutt will be considered.

SWINEFORD ET AL. v. PIPER.

Motion for review of departmental decision of July 2, 1894, 19 L. D., 9, denied by Secretary Smith, June 6, 1895.

OKLAHOMA TOWNSITE—PUBLIC PARK RESERVE.

JOSEPH E. DOLEZAL.

The approved survey of a townsite under the act of May 2, 1890, showing a reservation for the purposes of a public park, precludes the allowance of a town lot entry of any part of the land so reserved.

Secretary Smith to the Commissioner of the General Land Office, June 8, 1895. (E. E. W.)

On the 3d day of November, 1893, the above named Joseph E. Dolezal made application for a deed to a tract of land which he described as lot 10, of block 32, in Perry, Oklahoma, which application was rejected by the trustees, because, as shown by their endorsement, "(1) There is no lot 10 in block 32, and (2) block 32 is a public park reserve." Dolezal appealed to the General Land Office, and the action of the trustees being there affirmed, he then appealed to the Department.

On the 8th of September, 1893, a plat of the townsite of Perry, Okla-

homa, was prepared and certified as official, by C. H. Fitch, the officer in charge of surveys in that part of Oklahoma Territory known as the Cherokee Strip, and in which the town of Perry is situated. On that plat block "B" was included in a reserve for a public park, and block 32 was subdivided into lots, and shown to be subject to entry. Afterwards the boundary lines of the park reserve were changed so as to include block 32 and exclude block "B," and the last named block subdivided into lots, and made subject to entry. The plat showing this change was approved by the Commissioner of the General Land Office on the 14th of September, 1893. Two days later, September 16, at 12 o'clock, noon, the Cherokee Strip was opened to settlement. Dolezal alleges that he reached the Perry townsite at 35 minutes past 12, and immediately took possession of lot 10, of the said block 32. He also represents that he has built a house and made other improvements on the lot to the aggregate value of more than \$200, and resided on it continuously from the said 16th of September, 1893, to the date of his application for deed.

OPINION.—It is provided in chapter 8, of title 32, of the Revised Statutes that all townsites shall be surveyed and platted into lots and blocks, streets and alleys; and the act of Congress of May 2, 1890 (26 Stat., 91), goes a step farther and provides that thereafter "all surveys for townsites in Oklahoma Territory shall contain reservations for parks . . . schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres."

These are requirements of the law that must be complied with before the trustees are authorized to make deed to any portion of the tract, and by this proceeding all streets, alleys, and reserves for parks, schools, and other public purposes, are dedicated to public use, and no portion of any such streets, alleys or reserves is thereafter subject to conveyance by the trustees to private holders.

The applicant does not allege that he was misled to his injury by the plat that showed block 32 as subdivided into lots, and subject to entry, or that the change was improperly made, or that the reserve contains more than the maximum area. If either of these things had been true, the burden was on him to show it. But even if he had been misled by the first plat, that circumstance, however unfortunate for him, would not alter the case, because the change was made and approved by proper authority before he had any right to enter upon the townsite at all, and even after lawful entrance upon it he could not, by occupancy, improvement, or any other act, acquire any right to any part of it as against the requirement of the statute for the dedication of a reserve for a park.

The land applied for by this applicant is part of a reserve for a park, and not subject to private entry.

The decision of the Commissioner of the General Land Office is affirmed.

MULLIGAN v. STALTER.

Motion for review of departmental decision of March 19, 1895, 20 L. D., 225, denied by Secretary Smith, June 12, 1895.

RAILROAD GRANT—SECTION 1, ACT OF APRIL 21, 1876.

NORTHERN PACIFIC R. R. CO. v. CROSSWHITE.

The confirmatory provisions of section 1, act of April 21, 1876, are not limited to entries made prior to the passage of said act, but apply with equal force to entries made thereafter.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 12, 1895. (F. W. C.)

I have considered the motion forwarded with your office letter of March 19, 1895, for the review of departmental decision of May 1, 1891, in the case of the Northern Pacific Railroad company v. Benjamin Crosswhite, involving the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 23, T. 5 N., R. 10 W., Helena land district, in which it was held that said tract was excepted from the grant.

Although said decision was signed on May 1, 1891, it does not appear to have been received at your office for some reason until February 8, 1895, and was therefore not promulgated until February 13, 1895.

The tract is within the primary limits of the grant for said company, as shown by the map of general route filed on February 21, 1872, and the map of definite location filed on July 6, 1882. The land was excepted from the operation of the withdrawal attaching on the filing of the map of general route, by reason of the pre-emption filing of Louis Belly, filed on July 25, 1871, alleging settlement on the 12th day of that month.

So far as the record shows the land was free from claim at the date of the filing of the map of definite location July 6, 1882, but on May 28, 1883, prior to the receipt of the order of withdrawal, based upon the map of definite location, at the local office, Benjamin Crosswhite was permitted to make homestead entry of the land—which entry is still of record—under which he claims the land.

In disposing of the case your office held that as Crosswhite's entry was made prior to the receipt of notice of the withdrawal upon the map of definite location, it was confirmed by the first section of the act of April 21, 1876 (19 Stat., 35), which provides:

That all pre-emption and homestead enteries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time of the notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office,

and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels they shall be confirmed, and patent for the same shall issue to the parties entitled thereto.

Said decision was affirmed in departmental decision of May 1, 1891, under the authority of the decision of this Department in the case of *Catlin v. said company* (9 L. D., 423), for the review of which the company has filed the motion now under consideration. Said motion urges that it was error to construe the act of April 21, 1876, as being prospective so far as to confirm entries initiated after its passage, and that it was error to hold, if considered as prospective, that Congress had the power to confirm entries covering land, the title to which had vested in the company upon the definite location of its road.

The act of 1876 has been repeatedly applied so as to confirm entries made after the filing of the map of definite location and before the receipt of the order of withdrawal thereon, made at the local office, where such entries were made prior to the date of the passage of said act. At the time of the passage of said act the question as to when the rights under a railroad grant attached seems to have been the matter of some dispute, the rulings on the subject having undergone, from time to time, changes, and the evident purpose of Congress by the first section of said act was to protect those persons who, in ignorance of the rights of the company, supposing them to attach upon the filing of their map of location, were permitted by the local officers to make entry before the receipt of the order of withdrawal based thereon, at the local office.

The reason that influenced the action taken for the protection of those who had made entry prior to the passage of the act is surely as strong in the case of those who made entry after the passage of the act, and I can see no reason for limiting the scope of protection intended to be granted by said section, to entries made prior to its passage, and as was held in the case of *Wenzel v. The St. Paul, Minneapolis and Manitoba Railway Co.* (1 L. D., 333),

it is not part of my duty to here discuss the constitutionality of the act of 1876, nor the questions which may arise as to conflict of title by reason of its having a place on the statute books. Those are questions for the courts. My plain duty is to execute the laws under which I am called to act, in accordance with their letter and spirit as I find them.

From a careful review of the matter I can see no reason to disturb the previous adjudication made in this case, and the motion is accordingly denied.

JOHNSON *v.* LEAVENWORTH.

Motion for rehearing in the case above entitled (see 20 L. D., 195) denied by Secretary Smith, June 12, 1895.

HOMESTEAD ENTRY—SECTION 2, ACT OF JUNE 15, 1880.

QUINN v. TEBAY.

A motion for review that raises a question that was not in issue either at the hearing, or before the General Land Office, or the Department, on appeal, will not be granted.

The term "homestead laws," as used in the proviso to section 2, act of June 15, 1880, is employed in a generic sense, and will include and protect an intervening desert land entry.

Secretary Smith to the Commissioner of the General Land Office, June 12, 1895. (W. M. B.)

I have considered the motion for review, filed by Quinn, asking a review of departmental decision of March 17, 1894, in the case of Patrick Quinn v. John F. Tebay, affirming the decision of your office, dated October 15, 1892, holding intact the desert land entry of Tebay for the SE. $\frac{1}{4}$ of Sec. 3, T. 1 S., R. 4 W., Helena land district, Montana.

The record in the case discloses the following facts, to wit:

Patrick Quinn made homestead entry of the above described land May 1, 1871, and the same was canceled May 20, 1873.

May 10, 1883, about ten years subsequent to the cancellation of Quinn's entry, John F. Tebay made desert land entry for said described tract, together with other lands.

January 23, 1884, it seems that Quinn was allowed to make cash entry, at the local office, of the land embraced in his homestead entry of May 1, 1871, under the second section of the act of June 15, 1880 (21 Stat., 237).

On February 27, 1889, the cash entry, as above described, was canceled.

February 21, 1889, your office ordered a hearing between the parties to determine the truth of certain allegations contained in the affidavits of the plaintiff and others, filed in 1885, to the effect that the tract in question was not desert in character.

As the result of such hearing the local officers (being other than those before whom the hearing was had) held that the land was non-desert land. Upon appeal, your office, on March 23, 1892, sustained the action of the local officers, but subsequently, upon motion for review of that decision, for good and sufficient reasons, your office, on October 15, 1892, revoked its former decision, and held that the land involved was desert in character.

From that decision Quinn appealed to this Department, assigning the following allegations of error, to wit:

First. It was error to hold that the preponderance of evidence establishes the desert character of said land.

Second. It was error to hold that because there was a change in the office of register and receiver, that those who rendered the decision were not as well qualified to judge of the value of the testimony and therefore their decision did not have the weight that it should.

Third. It was error to have adhered to the former decision.

Thus it will be seen that the sole question raised and presented upon appeal was—whether the land in controversy was desert or non-desert in character. By departmental decision of March 17, 1894, as stated above, your office decision of October 15, 1892, was affirmed, and the tract in question held to be desert in character.

The applicant in his motion waives the question as to the character of this land and now asks that the decision of this Department be reviewed and revoked upon the ground that Quinn, “by virtue of provision contained in the second section of the act of June 15, 1880, had a right to the possession of the land . . . without reference to its character; that this right was inherent in him, at least until some one else had entered the land under the homestead law;” and further that the desert land entry of Tebay was not such an adverse claim sufficient to defeat the rights of applicant under provision of the act above cited.

The above question is raised for the first time by the motion under consideration, and was not in issue at the hearing, or when the decision of your office was rendered, and for that reason this motion should not be granted. *Vide* case of *Haling v. Eddy* (9 L. D., 337).

By assignments of error above set forth, it will be observed that the question raised by this motion was not before the Department on appeal, for which reason also the motion should be denied. *Vide* case of *Maison v. Central Pacific R. R. Co.* (9 L. D., 65).

It is of importance also to consider whether or not there is, in fact, any merit in the motion.

Provision contained in the act of June 15, 1880, is in words as follows, to wit:

Sec. 2. That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount therefor paid the government upon said lands shall be taken as part payment of said price: *Provided*, This shall in nowise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

The term “homestead laws” in the above quoted section 2 of the act of June 15, 1880, is used in the generic sense, and will include entries made under the desert land act, such as that made by Tebay for the tract in dispute; which being made prior to Quinn’s cash entry for the same land, will defeat applicant’s said cash entry and his right and claim in and to said tract.

For the foregoing reasons said motion is denied.

JOHN M. RANKIN.

Motion for review of departmental decision of March 28, 1895, 20 L. D., 272, denied by Secretary Smith, June 12, 1895.

SIOUX HALF BREED SCRIP—LOCATION—TIDE LANDS.

DEARBORN *v.* LANGIE.

The location of Sioux half-breed scrip on unsurveyed land is permissible, but until the government survey is filed the scrip location remains unadjusted, and it therefore follows, as said surveys are not extended over tide-water lands, that the right acquired by such a location is not sufficient to defeat the title of the State, by virtue of its inherent sovereignty, on its admission to the Union, over land within its limits below ordinary high water mark.

Secretary Smith to the Commissioner of the General Land Office, June 12, 1895.
(F. W. C.)

I have considered the motion forwarded with your office letter of May 31, 1895, for review of departmental decision of March 11, 1895, affirming your office decision of October 24, 1893, rejecting the application filed in the name of Louis Langie to locate Sioux half-breed scrip No. 356 C, and 356 D, upon certain unsurveyed lands in Sec. 8, T. 24 N., R. 4 E., Seattle land district, Washington.

It is admitted that the land in question is tide land over which the tide waters of Puget Sound ebb and flow.

By the act of February 22, 1889 (25 Stat., 676), the people of Washington territory were enabled to form a constitution and State government, and to be admitted into the Union on an equal footing with the original states. In accordance with said act the people, on July 4, 1889, in convention assembled formed the constitution and State government, and on November 11, 1889, the President, by proclamation, declared the admission of the State of Washington into the Union to be completed.

On October 18, 1889, applications to locate the scrip before described were filed in the local office, accompanied by an affidavit alleging that Langie had erected a house on the land, fourteen by fourteen feet, resting upon piles driven for that purpose, and a plat of the land claimed, indicated by piles, was filed. Shortly thereafter protests were filed against the acceptance of said application by H. H. Dearborn, John Farnham and the Seattle Improvement company. In these protests a hearing was requested in order to determine the exact status of the land.

The local officers, it appears, refused to order such hearing, believing that they had no jurisdiction until the locations had been adjusted upon survey, and the protestants thereupon appealed to your office, and, by your office letter "H" of February 14, 1891, the papers were returned to the local officers with directions to take appropriate action thereon.

On April 3, 1891, the local officers rejected the scrip applications in question because the lands applied for lie below the ordinary low water marks on the shore of Elliott's bay, from which action no appeal was taken although due notice thereof appears to have been served upon Langie's attorney who filed the applications in question.

This fact was duly reported to your office by the letter from the local officers dated May 13, 1891, and by your office letter of July 21, 1891, the papers were again returned to the local officers, and thereupon a hearing was ordered which resulted in a decision of the local officers dated February 28, 1893, against the applications to locate the scrip in question.

From said decision an appeal was filed on behalf of Langie to your office and by your office decision of October 24, 1893, under the authority of the decision of this Department in the case of Frank Burns (10 L. D., 365), the rejection of the local officers was sustained and the case was further prosecuted by an appeal to this Department.

By departmental decision of March 11, 1895, it was held that the case presented upon Langie's application is, in all important particulars, similar to that considered in the case of Frank Burns, and your office decision was affirmed. It is for a review of said decision that the present motion is filed.

This motion alleges error in holding the case to be similar to that of Frank Burns, in that it claims that the location of scrip under the act of July 17, 1854 (10 Stat., 304), is not required to be adjusted to the public surveys, and that a patent was not necessary to vest a title under the location of scrip issued under said act. Further, that it was erroneous to hold that the State of Washington upon its admission into the Union acquired a right to the land in question because by Sec. 2 of Article XVII. of its constitution the State has disclaimed all its title in and to said land in favor of appellant.

While it must be admitted that under the act of July 17, 1854, *supra*, the scrip therein authorized might be located upon any unsurveyed lands, not reserved by the government, upon which the Indians had made improvements, yet, the location made under said act upon unsurveyed land has always been required to be adjusted to the lines of public survey.

In the circular of July 17, 1854, issued under said act (1-Lester, 627), the scribee, in locating upon unsurveyed lands, was required to accompany his application by a diagram denoting natural objects and distances so as to enable the local officers, when the public surveys are made, to designate the legal sub-divisions embraced in the location, and in the circular of February 22, 1864, it was provided that—

Where the half-breed for himself may make actual settlement, his improvements will be notice on the ground to any other settler, and in this respect he will stand on the same basis as a pre-emptor on unsurveyed land, and, of course, cannot adjust his location until after the return of the township plat to the district land office. Hereafter, and within three months, he should repair to such land office, file his scrip

with his affidavit, designating specifically, in compact legal sub-divisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of these improvements, and file testimony of competent witnesses corroborative of his statement.

As it had come to the notice of this Department that the location of this scrip upon unsurveyed lands was frequently filed in the local office in order to permit persons, under the shadow of title thus acquired, to denude the land of the timber found thereon, and that after survey the parties would allow the time for adjustment to pass without action and then withdraw their scrip and relocate it elsewhere, it was provided by the circular of January 29, 1872, that the filing of this scrip on unsurveyed lands must be considered in the character of a location, and that should the party fail to adjust his claim upon survey, as required by the circular of February 22, 1864, the local officers would thereupon adjust the same, as nearly as practicable, from the map and description filed by the party at the time of filing his application.

These conditions were reiterated in the circular of May 28, 1878, issued under the act of July 17, 1854, and from the same it must be apparent that from the date of the passage of the act of 1854 it has been uniformly held by this Department that where a half-breed may make actual settlement and improvement upon unsurveyed lands, that he stands on the same basis as a pre-emptor on unsurveyed lands, and must upon survey adjust his claim to the sub-divisions of the government survey.

It must therefore be held that while the location is permissible upon unsurveyed lands, yet until the filing of the plat of the government survey, the claim initiated is an unadjusted one, and, as the government surveys are not extended over tide-water lands, the rights acquired by the location of Sioux half-breed scrip upon unsurveyed tide-water lands is not sufficient to defeat the title of the State, acquired by virtue of its inherent sovereignty upon its admission into the Union, over the land within its limits, below ordinary high water mark.

In the case of *Knight v. United States Land Association* (142 U. S., 183), the court holds as follows:

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. *Martin v. Waddell*, 16 Pet. 367, 410; *Pollard v. Hagan*, 3 How. 212, 229; *Goodtitle v. Kibbe*, 9 How. 471, 478; *Mumford v. Wardwell*, 6 Wall. 432, 436; *Wever v. Harbor Commissioners*, 18 Wall. 57, 65. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory. Authorities cited. But this doctrine does not apply to lands that had previously been granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. *San Francisco v. Le Roy*, 138 U. S. 656.

As the land in question is not incumbered by the the terms of exception stated in the opinion of the court, it is clear that the same is not

subject to disposition under the legislation embodied in the act of 1854, under which the scrip in question was issued.

As to the alleged disclaimer by the State under section two of Article XVII. of its constitution, of all its title in and to the land in question in favor of the appellant, I must say that I am unable to so construe the section referred to, which provides:

Sec. 2. The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands patented by the United States; *provided* the same is not impeached for fraud.

As the land in question was never formally patented under the location in question, and in view of the previous holding made in this decision upon the applications in question, I must hold that the same is not embraced within the provision of section two of the constitution referred to, and the motion for review is accordingly denied and the previous decision adhered to.

SETTLEMENT BEFORE SURVEY—HOMESTEAD ENTRY—HEIRS.

PATTON v. GEORGE.

Where a settler on unsurveyed land dies prior to the survey thereof, and a homestead entry is subsequently made for the heirs it should follow the language of the statute and be made for the benefit of "the heirs or devisee" of the deceased settler.

Secretary Smith to the Commissioner of the General Land Office, June 12,
(J. I. H.) 1895. (V. B.)

The record of this cause shows that in September, 1883, John S. George settled upon the NE. $\frac{1}{4}$ of Sec. 10, T. 2 S., R. 6 W., Los Angeles, California, at that time not surveyed; that on August 1, 1885, he died, leaving a will in which he bequeathed his possessions to one A. G. Patton, plaintiff herein; that Patton at that time had acquired rights by homestead and timber-culture entry to three hundred and twenty acres of land, and exhausted his right to secure any more public land; that Patton, on the death of George, claiming under the will as devisee, entered upon and cultivated the land settled upon by George before his death; that in November, 1885, one Horton entered upon the land and lived there until 1887; that on May 21, 1887, one Ferguson entered upon and cultivated the land, living there until August, 1887; that on June 20, 1887, one Lingo entered upon and cultivated the land, living there until the end of the year 1887; that on August 29, 1887, Miles W. George, brother of the deceased, appeared, and with Patton's consent, but without regard to Ferguson and Lingo, then living on the land, entered upon the land, erected a house, and began cultivation from that on, living there with his family.

It appears that during the occupation of these various persons, Patton tried to and did cultivate portions of the land, but neither lived upon nor had possession; that he paid Horton \$300 to move off, and offered

George \$800 to give up the land. The former left, the latter remained. During this period, the land was not surveyed.

The survey and plat of the land was finally filed on February 4, 1888. Up to this time there had been several contests in the local courts over the crops on this land. In one Ferguson defeated Lingo, and in three others between George and Patton the latter was defeated each time. While the decrees in these cases are not evidence, being merely the opinion of the judge making them, they are referred to simply in explanation of the case.

On February 11, 1888, a week after the land first became public land, Miles W. George made homestead application to enter the land in controversy for the heirs of John S. George, deceased, and, though that entry was not allowed until June 2, 1890, having been allowed, it related back to the date of the application, February 11, 1888, hence is the first record relating to the land in controversy.

Subsequently on February 11, 1888, A. G. Patton filed declaratory statement, as devisee of John S. George, to take the land under the pre-emption laws.

On March 22, 1888, John Ferguson filed a declaratory statement of his intention to pre-empt the land, and on May 23, one Lingo also filed a declaratory statement to the same effect.

On April 11, 1889, Miles W. George applied to make an individual homestead entry of the land, and his application was refused. George appealed, and, on June 6, 1890, the Commissioner of the General Land Office sustained the rejection.

On September 2, 1890, after due notice, George submitted proof on his entry for the heirs. On the same day, Patton filed a protest against the acceptance of this proof, and with it a homestead application to enter the land "as devisee of John S. George, deceased."

On September 25, 1890, the taking of testimony was begun, and on October 24, 1890, it was concluded.

On May 21, 1891, the local office rendered a decision sustaining Patton's protest, and recommended the cancellation of George's entry and allowance of the entry of Patton as "devisee."

This decision was made on a ruling of this Department, in the Tobias Beckner case (6 L. D., 134), and a circular (9 L. D., 452), sustaining that ruling, issued October 4, 1889.

On June 21, 1891, George appealed, and on June 22, 1892, your office rendered a decision in favor of Patton, basing it upon the ruling in the Tobias Beckner case and the circular issued on October 4, 1889, upholding that ruling.

On August 27, 1893, George appealed to this Department, claiming the decision of your office to be contrary to law and evidence.

In *Harbin v. Skelley* (16 L. D., 161), it was held that

the administrator of a deceased pre-emptor may file declaratory statement and submit final proof for the benefit of the heirs where the settler dies prior to the survey of the land.

In this case, the entry of Miles W. George is made to accomplish the intendment of section 2291, Revised Statutes, and should have been in the language of that section, for the benefit of "the heirs or devisee" of John S. George, deceased; but, in view of all the circumstances of the case, that entry may be permitted to remain intact; and if the proof submitted thereunder be deemed sufficient, you will issue final certificate thereon to the heirs or devisee of John S. George, deceased. Thus the spirit of the law will be carried out, and the parties will be placed in a position to have their rights finally determined in a judicial tribunal if they so desire.

PRACTICE—APPEAL—REVIEW—APPLICATION TO ENTER.

McMICHAEL *v.* MURPHY ET AL. (ON REVIEW).

In the computation of the time allowed for appeal from the General Land Office, where a motion for review has intervened, the appellant is entitled to the additional ten days allowed, independently of the same period given for filing the review, where notices of the Commissioner's action in each case are sent through the mails by the local office.

The rights of an appellant are not prejudiced by the negligence of the local officers, where the party himself is guilty of no laches.

A motion for review will not lie for the consideration of a question not in issue when the original decision was rendered.

No rights are secured under an application to enter filed at a time when the land is covered by the record entry of another.

An application to enter land subject thereto is equivalent to an actual entry so far as the rights of the applicant are concerned, and, in the event of his death, his heirs are entitled to complete the entry.

Secretary Smith to the Commissioner of the General Land Office, June 12, 1895. (J. I. P.)

By your office letter "H" of April 11, 1895, you transmitted here a motion by Samuel Murphy to review and reverse the decision of the Department in the above entitled case, dated February 25, 1895 (20 L. D., 147), and by your office letter "H" of April 16, 1895, you transmitted an amended supplemental motion for review (so called) of said decision, filed also by Mr. Murphy.

The tract involved is the SW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 3 W., Oklahoma City land district, and before stating the assignment of errors on which the motion for review is based, a brief resume of the pertinent facts in the case, as set forth in the decision complained of, so far as they affect Murphy and Holt, is deemed necessary.

On March 7, 1890, there was pending in your office, on appeal, the case of Blanchard *v.* White *et al.*, White being the homestead entryman of the tract in question. On that date your office, affirming the decision of the local office, held White's entry for cancellation. Four days thereafter, viz: on March 11, 1890, and before any appeal from

said decision had been taken, Levi Holt, through his attorney in fact, one Julius V. Briesen, filed a soldier's declaratory statement and application to make homestead entry of said tract under section 2309 of the Revised Statutes of the United States. That application, so says the decision complained of, "was received at the local office but not placed of record," but "was suspended pending final action on the case of *Blanchard v. White et. al.*, following the rule,

That an application to enter, made after the date of judgment and within the time allowed for appeal, should be received, but not placed of record until the time for appeal has expired, or the rights of the entryman on appeal has been determined by this Department.

citing John H. Reed (6 L. D., 563), and cases following it.

While the case of *Blanchard v. White et al.* was pending on appeal here, and before it was decided (13 L. D., 66), White, on November 29, 1890, relinquished his homestead entry to said tract, and Murphy was allowed to make homestead entry thereof. The decision complained of held that action of the local office to be erroneous; that on White's relinquishment the pending application of Holt should have been placed of record, and your office decision of September 11, 1891, rejecting Holt's application, was modified in this:

That inasmuch as Murphy's entry is of record, he will be allowed thirty days from date of notice of this decision to show cause why his entry should not be canceled, and Holt's application placed of record.

The grounds upon which that decision is attacked by the motion for review are substantially as follows:

It is alleged *first* that said decision is erroneous, in this—that as a matter of fact Holt's application filed March 11, 1890, was not "suspended" as stated in said decision, but that it was *rejected* by the local office, that service of notice of said rejection and of his right of appeal in thirty days therefrom was acknowledged in writing, by Briesen, Holt's attorney in fact, and that an inspection of the indorsements on the original application of Holt, will disclose these facts; that Holt never appealed from the alleged rejection of his application, and hence lost all his rights in the premises; and that after the local office had rejected his application they had no right to hold it in suspense. And in support of this contention there is filed with the motion a copy of Holt's application with the indorsements thereon. The original application of Holt, filed with the papers in the case of *Blanchard v. White et al.*, *supra*, has the following indorsements on the back thereof, except the numbers, which are mine, and are placed there for convenient reference—

1. Holt. No.
 Received
 for filing
 Mar. 11—1890
 at Guthrie Land Office,
 Ind. Ter.

2. Presented March 11. 90. Held in suspense during right of appeal of entryman and contestants, Blanchard and Cook Ewers White and for consideration of pending prior adverse claims, and applications to enter.

3. Rejected for conflict with H. E. No. 6, made April 23d 1889 by Ewers White. See Con. Doc. 13-459-515. Thirty days for appeal. Fees tendered. Fees tendered.

C. M. BARNES,

Recr.

C. B. B.

The indorsement indicated by the figure 1 is made from a red ink stamp, except the word "Holt" which is written in pencil. The indorsement indicated by the figure 2 is in pencil; that indicated by the figure 3 is in ink, and has pencil marks drawn diagonally across it in the shape of a letter "X," apparently with the intention of cancelling all of it except the words "Fees tendered," and the signature of the receiver. If that were the intention, it would leave the uncanceled indorsement at "2" as the apparent action of the local office, with the signature of the receiver attached there to.

There is also this indorsement on the back of said application—

I acknowledge service of notice of the rejection of the within application and of my right of appeal within 30 days from March 11, 1890.

JULIUS V. BRIESEN.

It would appear from these indorsements that when the application was presented by Briesen the indorsement indicated at "3" was placed on the back thereof by the receiver, and that Briesen, believing that to be the action of the local office, promptly acknowledged service of notice thereof. But there is no evidence in the record anywhere that the register ever concurred in that action of the receiver, as required by rule 66, Rules of Practice. Indeed, the evidence is that the joint action of the local officers was as indicated by the indorsement at No. "2." The letter of the local officers, dated April 11, 1890, on file in the case of *Blanchard v. White, supra*, gives the status of said tract at that date, and transmits to your office for its consideration and instruction in relation thereto the application of Holt, and other papers, and contains this statement—

On March 11-90 Levi Holt, by agent, tendered a soldier's statement which we hold in 'suspense' pending right of appeal of entryman and contestants and for consideration of pending prior adverse claims and applications to enter.

This letter signed by the register and receiver shows conclusively what their joint action on said application was. The reasonable conclusion as to the indorsement at "3," then, is that the receiver, after

making it, discovered, on consultation with the register, the error, and that it was canceled, as indicated by the pencil marks drawn across it, and that the indorsement at "2" in pencil was then made.

There is no statement or suggestion on their letter of April 11, *supra*, that the application was ever rejected by them. The uncanceled indorsement in pencil on the back of said application corresponds with the statement of the register and receiver in their report, and your office decision of September 11, 1890, and of January 18, 1893; both declare that said application was "suspended." Indeed, the record evidence is so uniform and overwhelming on that point, that in my judgment, it removes the question from discussion, and renders that ground on which the motion for review is based untenable.

It is further urged in said motion that Holt's motion for review of your office decision of September 11, 1891, rejecting his application and his appeal from said decision were both filed out of time.

By letter of January 30, 1892, the local office at Oklahoma City, notified your office that on October 26, 1891, notice of your office decision of September 11, 1891, had been mailed to Briesen, at Guthrie, Oklahoma Territory, by registered letter, but had been returned to the local office unopened, and that on December 4, 1891 (instead of December 7, 1891, as stated in the motion), Holt had filed a motion for review of said decision.

Notice of your office decision of September 11, 1891, having been transmitted by the local office through the mails, Holt had forty days from October 26, 1891, in which to file his motion for review. (*Rodgers v. Herrington*, 17 L. D., 295.) He filed it on December 4, 1891, which was the 39th day of the period within which it should have been filed, and hence was in time.

Your office, on April 16, 1892, denied his motion for review. On May 17, 1892, he received notice of that action, transmitted by the local officers through the mails. When notices of your office decisions are so transmitted, five days additional are allowed for the transmission of the notice and five days additional for the return of the appeal. (Rule 87, Rules of Practice.) Excluding from the time allowed for appeal the time consumed by the motion for review, we find that on May 17, 1892, when notice of your decision denying said motion was received, thirty-nine days of the seventy allowed for appeal and transmission thereof had passed. Nine of these thirty-nine days, however, were carved out of the additional days allowed for filing the motion for review, as held in *Rodgers v. Herrington*, *supra*. The seventy days allowed Holt in which to appeal, included ten days additional granted under Rule 87 of Practice. It is evident, therefore, that if the thirty-nine days be deducted from the seventy, it in effect robs Holt of the ten additional days granted by Rule 87, in which to file his appeal, and would be in direct opposition to the express terms of that rule. I am decidedly of the opinion that the additional ten days allowed for the

filing of a motion for review is entirely separate and distinct from the ten days allowed for filing an appeal. Deducting the thirty-nine days from seventy left thirty-one days. The additional ten days allowed under Rule 87, *supra*, extended the time in which his appeal should be filed to forty-one days from May 17, 1892. He filed it on June 23, 1892, or on the thirty-seventh day of the period within which it should be filed, and was therefore in time.

Hence the allegation that the motion for review and appeal were not filed in time is also untenable, and cannot be sustained.

But it is contended that Holt's appeal was not filed in the General Land Office until April 21, 1894, more than two years after receipt of notice of your office decision of September 11, 1891. Admitting that allegation, it was not through any fault of Holt's that the filing of his appeal in the General Land Office was delayed, but through the carelessness and neglect of the local officers, and he cannot be held to have lost any rights through their neglect, when he is guilty of no laches himself.

But it is further alleged as a ground for the review of the decision complained of that at the time Holt filed his application to enter the tract here involved, to wit: on March 11, 1890, there was pending in your office his appeal from a rejection by the local office at Guthrie of an application of his made August 31, 1889, to enter another and different tract from that here involved. That on April 19, 1890, there was filed in the local office what purported to be a withdrawal of said application and a dismissal of said appeal by Holt. That on May 3, 1890, Holt made an affidavit and filed it in the local office in which he stated that the pretended withdrawal of his application to enter and dismissal of his appeal was a forgery, and that he *had not withdrawn* his application to file on said land. It is further shown that on January 16, 1891, your office sustained Holt's appeal and allowed him thirty days in which to make entry of the tract embraced in his first application. But it is not shown, nor asserted, that he ever did make entry of said tract.

It is earnestly contended by counsel for Murphy that Holt's affidavit of May 3, 1890, is conclusive evidence of the fact that he had not abandoned his first application nor his appeal from its rejection, and that he was seeking to speculate on his homestead right as a soldier, and that hence his application of March 11, 1890, was in bad faith as his affidavit of May 3, 1890, with reference to his former filing shows.

It will be observed that the last question is an entirely new one; that it has never been in the case before, and is wholly outside the record on which the case was originally decided.

It is insisted by Murphy's counsel, however, that it may be considered here; that the Department may, on review, consider any material question which, it appears from the record, was not considered in the original disposition of the case, and they refer to *Hemsworth v. Hol-*

land (8 L. D., 400); Pueblo of San Francisco (5 L. D., 483, 494); Northern Pacific R. R. Co. v. Bass (14 L. D., 443).

Those cases are not in point. The first and last ones hold in effect that questions properly in the record, which have been overlooked in the original disposition of the case may be considered on motion for review. And the second case cited does not touch on the question here presented, but incidentally treats of the powers and jurisdiction of the land department. The principal questions there involved being whether or not a patent issued to the city of San Francisco could be recalled, and whether one Secretary of the Interior could reverse the decision of his predecessor. However, in the case of *Haling v. Eddy* (9 L. D., 337), it is squarely held

that review will not lie for the consideration of a question not in issue when the original decision is rendered. See also *United States v. Montgomery et al.*, on review (12 L. D., 503).

Unquestionably this matter is one for Murphy to present in the showing to be made by him, why his entry should not be canceled, and Holt's placed of record. For the reasons stated, therefore, Murphy's motion for review is denied.

Since the consideration of the motion for review filed by Murphy, there has also been filed a motion by McMichael to review said departmental decision of February 25, 1895. He alleges nine errors in said decision, as a basis for his motion for review. He alleges, among other things, that his application to enter said tract, filed in the local office with his protest on August 31, 1889, was pending there at the date White filed his relinquishment, and that under the rule laid down in the decision complained of, with reference to Holt's application, his application should have been placed on record instead of Holt's, because first filed, and he alleges that the Department did not pass on that point in the decision complained of. By reference to the next to the last paragraph of that decision, it will be seen that the very point here raised was passed on. But it might be added to what is there said, that his (McMichael's) application to make entry was filed at a time when the tract in question was still segregated by White's entry, and that no rights could be acquired by an application at that time. Holt's application, on the contrary, was filed at a time when, under the rulings of the Department, it might be received and held subject to the rights of the entryman on appeal, or of the preferred rights of the contestant.

He also insists that when Holt filed his application, he was residing on the land, and that while such residence and settlement gave him no rights as against White or the United States, they did, as against every one else, including Holt. The rule in such cases is that the rights of a settler residing on the land covered by an entry attach *eo instanti*, on the cancellation of the entry, as stated on the decision sought to be reviewed. But they attach only where he is in possession of the tract when the entry is canceled (see decision). And as McMichael was not

in possession of said tract when White's entry was canceled on his relinquishment, he acquired no rights by being on the land when Holt filed his application, as against Holt or any one else.

He also insists that he never received any notice of Holt's appeal from your office decision of September 11, 1891. The appeal filed by Holt has the affidavit of his attorney attached that he had, by registered letter, mailed a true copy of said appeal and specification of errors and argument to both McMichael and Murphy, and also attached thereto are two post-office receipts, one showing that registered letter No. 1004 was received June 23, 1892, addressed to Hon. Samuel Murphy, Oklahoma, Oklahoma Territory, and the other showing that registered letter No. 1005 had been received, addressed to W. F. McMichael, of the same place.

This is sufficient evidence of service of notice of said appeal and specification of errors and argument thereon (see Rules 94, 95 and 96, Rules of Practice).

He also urges as against Murphy that he never appealed from the decision of your office of September 11, 1891, holding that his entry was illegally allowed, and had never complied with the order made in that decision to show cause why his entry should not be canceled, and McMichael allowed to enter the land. The hearing ordered by that decision rendered an appeal by Murphy, from the holding that his entry was illegally allowed, unnecessary, to preserve his rights. The result of that hearing showed that McMichael had no rights that impaired the validity of Murphy's entry, and it was held intact, as stated in the decision complained of.

He also stated that at the date the decision sought to be reviewed was rendered, to wit, February 25, 1895, Levi Holt was dead, and that there is no law in existence that warrants or authorizes the substitution of his heirs in these proceedings. It has been held frequently by the Department "that an application to enter is equivalent to an actual entry, so far as the rights of the entryman are concerned." *Goodale v. Olney* (12 L. D., 324), *Samuel J. Haynes* (Id., 645). This rule has been held to apply only in cases where the land involved was subject to entry, and the application had been improperly rejected. See *Goodale v. Olney*, on review (13 L. D., 498); *Maggie Laird* (13 L. D., 502). But when Holt filed his application it was properly filed under the rules of the Department, as stated in said decision, and was held in abeyance, as therein stated, and when White's relinquishment was filed, November 29, 1890, the failure of the local office to place Holt's application of record was in effect a wrongful rejection of it, and brings him squarely within the rule laid down in the last two cases cited. If, then, his application was equivalent to an entry, so far as his rights were concerned, Holt's death does not prevent the substitution of his heirs in these proceedings. It needs no citation of authority to establish the proposition that where an entryman dies before completing his entry,

his heirs may make final proof and payment, and patent shall issue to them. Holt's heirs stand in the same position as though his entry had been of record, unless the showing to be made by Murphy shows Holt to have been disqualified when his rights attached under his application.

The other questions presented by the motion were either fully considered in the decision complained of, or were identical with those presented by Murphy's motion, and hence will not be further considered here.

McMichael's motion for review is also denied, with instructions that if Holt be indeed dead, his heirs may be substituted in these proceedings in his stead.

TOWN LOT CONTEST—SURVEY—OCCUPANCY.

J. F. McGRATH ET AL.

The trustees of a townsite have no authority to make a deed to a town lot before the tract has been surveyed and platted into lots and blocks, streets and alleys, nor are they authorized to make a deed to any portion of a street or alley, or to execute deeds to lots otherwise than as they are surveyed and platted.

One who takes possession of a town lot by force or fraud, or maintains occupancy as the tenant of another, is not thereby invested with a right to a deed, as against either his landlord or the rightful claimant.

Secretary Smith to the Commissioner of the General Land Office, June 12, 1895. (E. E. W.)

STATEMENT.—Application for deed to lot 11, of block 57, in Guthrie, Oklahoma, was made by J. F. McGrath on the 29th of August, 1890, and by M. M. Mulrein on the 23d of September of the same year. On the 22d of the last named month Charles Brown applied for deed to a lot which he described by metes and bounds. The area of lot 11 is twenty-five by one hundred and forty-two feet, and McGrath and Mulrein both described it by number, according to the recognized survey and plat of the townsite. The lot applied for by Brown does not conform to the survey, either in lines or area. Its area is only twenty-five by one hundred and ten feet, and it lies across Oklahoma avenue, one of the principal streets of the town, and embraces twenty feet of the north end of the said lot 11, which is on the south side of the said Oklahoma avenue, and ten feet of the south end of a lot lying on the north side of that thoroughfare.

Each of the applicants claims deed on the strength of prior occupancy and improvement.

McGrath erected a tent and took up his residence on lot 11 at 2:30 in the afternoon of the opening day, April 22, 1889. A few days later he built a small house on the lot and rented it to a man named Beck for a grocery store. About this time a man named Carter had built a house ten or eleven feet from McGrath's, and they agreed to jointly build a house in between. As they did not know where the dividing

line between them would run, they agreed that the one receiving the ground, when the survey was made, should pay the other for his half interest in the house. McGrath was to employ the labor, and he let the contract to a carpenter named Rhude. This was early in May, and McGrath was then called to Kansas by the fatal illness of his daughter. During his absence the house was completed, and when he returned about the 20th of the month, he found it occupied by Mulrein. It is plainly to be seen from the testimony that Mulrein had got into possession by collusion with Rhude, with the intention of taking the lot from McGrath, though he was not then openly claiming it, and even paid McGrath rent from the 20th of May to the first of July. He denies the payment of rent, and claims to have paid Rhude for building the house, but admits that he "kept quiet" a month or so before setting up claim. In March, 1890, McGrath brought suit of forcible entry and detainer in the territorial court, and caused Mulrein to be ejected. McGrath slept on the lot from the date of the opening to the day of his departure for Kansas, and he maintained actual occupancy in person and by tenant to the date of the entry of the land as a townsite.

Brown staked the lot described in his application about 3 o'clock in the afternoon of the opening day, and slept on it that night. On the 23d he caused some furrows to be plowed on two sides of the lot, and on the 24th he put up a tent. About two-thirds of this tent was in Oklahoma avenue, and one-third on lot 11. On the 27th or the 29th of April, five or seven days after the opening, he does not remember which, the town marshals came along clearing the street, and tore down his tent. He yielded to this, and has never occupied the lot since, or made any other improvements on it, and does not show that he has ever made any effort to do so.

The townsite board rejected Brown's application, and awarded lot 11 to McGrath, and Brown and Mulrein both appealed. The General Land Office affirmed the action of the townsite board, and then they both appealed to the Department.

OPINION.—The trustees of a townsite are not authorized to make deed to a lot until the tract has been surveyed and platted into lots and blocks, streets and alleys. Rev. Stat., 438; 26 Stat., 109. By this proceeding the streets and alleys are dedicated to public use, and the trustees have no authority to execute a deed to any portion of either a street or an alley. To make such survey and plat, and dedication of streets and alleys, is not only the right of the body of the occupants of the site moving together, but it is a requirement of the law which they must comply with before they may enjoy its benefits; and no individual occupant can acquire any right to his particular claim prior to such survey and dedication as against this right and requirement of all the occupants as a community. The reason for such surveying and platting, and dedication of streets and alleys, is too obvious to require explanation. Without such care and contribution there could be neither order, system, convenience, nor beauty.

And the trustees are not only without power to execute deed to any part of a street or alley, but they have no authority to make deeds to lots otherwise than as they are surveyed and platted. The execution of deeds to fractional parts of surveyed and numbered lots, or to lots described by metes and bounds which did not conform to the survey, would be unauthorized, and soon result in interminable confusion and mischief.

Brown's application for fractions of two lots and a part of a street, was properly denied.

As between McGrath and Mulrein, the evidence shows conclusively that McGrath was the first occupant, and that he made valuable improvements and maintained occupancy, in person and by tenant, to the date of the entry of the land as a townsite. And the allegation that he derived some advantage from entrance into the country by the agents of the Newton Syndicate prior to the hour fixed for the opening is not supported by the evidence. The evidence also shows that Mulrein got possession of the house through Rhued's bad faith, and in willful violation of McGrath's rights, and that after being discovered on the lot, he acknowledged McGrath's paramount right by paying rent to him.

One who takes possession of a town lot by force or fraud, or maintains occupancy as the tenant of another, is not thereby invested with right to deed as against either his landlord or the rightful claimant.

The decision of the General Land Office is affirmed.

PRACTICE—APPLICATION FOR CERTIORARI—APPEAL.

BLACKWELL TOWNSITE *v.* MINER.

An application for certiorari will not be granted where it appears that the decision of the General Land Office rendered substantial justice in the premises, even though the right of appeal is wrongfully denied.

Secretary Smith to the Commissioner of the General Land Office, June 12, 1895. (J. I. P.)

By your office letter "G" of May 20, 1895, you transmitted here the application of Otis A. Miner for a writ of certiorari, requiring your office to send up to the Department the papers relating to the entry and final proof of the Townsite of Blackwell, Oklahoma Territory, together with Miner's protest against the same and the application for a hearing thereon.

The tract involved is the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 23, T. 27 N., R. 1 W., Perry, Oklahoma Territory, land district.

It appears that on May 31, 1894, the record being clear of all claims and filings against said tract, one E. C. Dorman filed in the local office at Perry a paper in which he stated that he, in behalf of the townsite settlers on said tract, applied to enter it "as a townsite for and in their

behalf and in their name." He also asked in said paper that Townsite Board No. 14 be assigned to enter said land. That paper had endorsed thereon, "Townsite application No. 34," and was treated by your office as a request that Townsite Board No. 14 be assigned to make entry of said land, and on September 28, 1894, by its letter "G," your office directed said board to make such entry, under the act of May 14, 1890 (26 Stat., 109).

At the date Dorman filed the paper above described the E. $\frac{1}{2}$ of said NW. $\frac{1}{4}$ was covered by homestead entry No. 1736, of Frank Poots, made October 7, 1893, which had originally embraced all of said NW. $\frac{1}{4}$.

August 27, 1894, Otis A. Miner made application to make homestead entry of all of said NW. $\frac{1}{4}$, which application was rejected by the local office "on account of said homestead entry of Poots and townsite application No. 34."

August 28, 1894, Miner filed in the local office a protest, so-called, duly corroborated, alleging in substance that Poots, prior to making his homestead entry, had made a written agreement with the townsite people, to release to them the W. $\frac{1}{2}$ of said NW. $\frac{1}{4}$ for a valuable consideration; that said town site application was in the interest of a fraudulent speculation; that it had not been properly presented, in that it had not been presented by the proper authorities; that lots had been sold by the applicants before application; and that the law had not been complied with prior to presenting said application.

September 19, 1894, Miner filed an appeal from the rejection of his homestead entry, alleging as grounds therefor substantially the same matters set forth in his protest.

Your office, by letter "G" of October 13, 1894, held as follows:

The charges contained in said protest would not warrant the ordering of a hearing, even if there was an application for townsite entry pending before this office, as there were no charges against the legality of the claim of the townsite settlers contained therein, which, if proven, would warrant the refusal of a proper application by them for townsite entry upon proof of municipal occupation, etc.

However, said paper signed by Dorman was not treated as an application to enter, and Board No. 14 was assigned to make entry as aforesaid, and the matter is supposed to be now pending in your office "subject to the right of any one to bring a proper contest against the allowance of said entry."

The protest of Miner was dismissed by said letter "G," and the action of the local officers in rejecting his homestead entry was affirmed. It was also held as to Poots' entry, that—"It will stand subject to the right of Miner, or others, to attack it as they see fit and as warranted by law."

Miner appealed from that decision. He did not allege any error, however, in that portion of said decision affirming the action of the local officers in rejecting his homestead application. All the errors specified went to that portion of the decision which dismissed his protest.

October 15, 1894, the application of Board No. 14 was filed to make townsite entry of said tract, and after notice by publication, final proof was made thereon November 21, 1894. On November 20, 1894, when

final proof was taken, Miner appeared at the local office and filed a motion for a continuance, alleging that he had received no official notice of your office decision of October 13, 1894; that if he were given from sixty to ninety days—

he would show that “the Townsite corporation and the parties who make this application No. 34” organized said townsite company in Winfield, Kansas, prior to the opening of the “Strip” on September 16, 1893, and had been looking over the town and locating this addition to the town of Blackwell. He also alleged that there were clerical errors in the notice of a hearing for the 20th of November, 1894, which was taking of final proof; that he would be able to prove that the municipal occupation of said land was insufficient, and that said townsite lacked the requisite number of actual inhabitants, and that he believed he was able to prove said allegation by either record evidence or oral testimony.

This motion was overruled by the local office, but the privilege was given Miner of cross-examining the witnesses, which he does not appear to have availed himself of.

Miner appealed from the decision of the local officers, overruling his motion for a continuance, alleging that he had no notice of your office decision of October 13, 1894, and asking that he be allowed his day in court.

Your office, by its letter “G” of January 23, 1895, held that the action of the local office in overruling Miner’s motion for a continuance was not an action from which an appeal would lie. It also held in effect concerning Miner’s appeal from its decision of October 13, 1894, that the errors specified in his appeal were directed only to that portion which passed on the questions presented by his protest; that the appeal alleged no error in that portion of said decision which rejected his homestead application, and that no error being alleged as to that portion of said decision, it had the effect of rendering the action of your office, rejecting his homestead application, final, in that it was not appealed from, and that, reduced to its last analysis, Miner’s attitude was that of a protestant without interest in the tract in controversy, and therefore without the right of appeal, which was accordingly denied. Hence this application for certiorari.

It is stated in the decision denying said appeal that Miner had never alleged any settlement on said tract, nor asserted any adverse claim thereto, nor is he now asserting any.

The decision of October 13, 1894, rejecting Miner’s homestead entry and dismissing his protest, was certainly one from which he had the right of appeal. True, that decision passed on the questions presented by the two principal propositions above stated; but there were not *two* decisions, and although the errors specified make no reference to the rejecting of the homestead application, still, they were sufficient under the rules of practice to secure the transmittal of the whole record here, and for this Department then to determine whether it would consider, on its own motion, that portion of the decision to which no errors were assigned.

An appeal goes to the whole of a decision, and where, because of any question involved, the decision is one from which the right of appeal lies, any appeal duly filed, alleging specific errors, is sufficient to oust the further jurisdiction of your office, and to bring up the whole record for the consideration of the Department.

I am clearly of the opinion, therefore, that your office erred in denying Miner the right of appeal, but the further question presents itself, whether notwithstanding that error, said decision did not render substantial justice in the premises, and whether it will be necessary to order up the record in order to pass on the questions involved.

The paper filed by Dorman in behalf of the townsite settlers was in the nature of a *caveat*, that said W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ was "occupied for townsite purposes within the meaning of the act of May 14, (26 Stat., 109) (*Benson v. Hunter*, 19 L. D., 290), and was sufficient to exclude it from entry under the homestead law. The segregation of the E. $\frac{1}{2}$ of said NW. $\frac{1}{4}$ by Poots' homestead entry of course excluded that tract from disposition under said law, so that the rejection of Miner's homestead application was unquestionably proper.

His protest, so far as the townsite was concerned, addressed itself to an entry not yet in existence, and so far as Poots' entry was concerned, referred to matters which might have been the subject of a contest, if properly alleged, and it is not apparent how the dismissal of that protest deprived Miner of any substantial rights, as the decision of October 13, 1894, expressly held said entries intact, subject to contests properly instituted by Miner or any one else.

But it is asserted that notice of that decision had not been received by Miner up to the date when the townsite board made final proof on the entry made by it October 15, 1894, and that hence his motion for continuance should have been sustained. The attorneys for appellant earnestly contend that he could not be compelled to submit his testimony on the day the townsite board made its final proof, and that a continuance to a day certain was obligatory on the local officers when Miner made a motion to that effect, and reference is made to *Hoover v. Lawton* (9 L. D., 273), and *Martenson v. McCaffrey* (7 L. D., 315). These cases each refer to instances where the protestant was asserting an adverse claim to the tract involved, based on alleged prior settlement. Miner's status is not that of a protestant who is asserting such adverse claim to the land, and hence the decisions cited do not apply.

Occupying as he does the position of "*amicus curiae*" so far as his protest is concerned, his failure to receive notice of your office decision of October 13, 1894, as stated, did not deprive Miner of any substantial rights. The privilege of contesting the entry of the townsite board and of Poots' is yet open to him.

I am therefore of the opinion that, notwithstanding the error in denying Miner's appeal, your office decision of January 23, 1895, rendered substantial justice in the premises, and that the application before me

presents so fully the questions involved as to obviate the necessity of sending up the record for further consideration.

The application is therefore denied.

DESERT LAND ENTRY—ORDER OF SUSPENSION.

MAGNER *v.* LAWRENCE.

The departmental rule that excludes from the period allowed for the reclamation of land within a desert entry such time as said entry may be suspended is within the scope of administrative authority, and not violative of the desert land law.

Secretary Smith to the Commissioner of the General Land Office, June 12, 1895. (C. J. W.)

April 2, 1877, Frederick W. Lawrence made desert land entry No. 22, for S. $\frac{1}{2}$ and NW. $\frac{1}{4}$, Sec. 32, T. 25 S., R. 25 E., M. D. M., Kern county, California.

September 12, 1877, Secretary Schurz directed your office to suspend all entries made in the land district including above entry, under act of March 3, 1877 (19 Stat., 377), and cause an investigation to be made before the local officers as to the character of the tracts. (Vol. 22, 225 Lands and Railroads, Secretary's office.)

On September 28, 1887, pursuant to said order, by letter "C", your office suspended desert land entries No. 1 to No. 337, including above entry of Frederick W. Lawrence.

January 12, 1891, Secretary Noble directed that the order suspending said entries be revoked and that the time between the date when said order—

of suspension became effective and the date of its revocation, will be excluded from the time within which the entryman is required to make proof of his compliance with the requirements of the law. (U. S. *v.* Haggin, 12 L. D., 34.)

By letter "H" of February 10, 1891, your office revoked the order suspending said entries.

On June 10, 1891, David J. Magner filed his affidavit of contest alleging that the land embraced in said entry was not desert at the date of entry; that the land has not been reclaimed by Lawrence within the time prescribed by law, nor at any other time, and that it has never been reclaimed by any one in accordance with law. The affidavit contained other allegations not necessary to be stated.

On March 15, 1893, Magner filed an affidavit showing that Lawrence died December 5, 1881, leaving as his only surviving heirs two daughters, Annie U. Corbett and Amelia O. Hobart, and one son Everett Lawrence, and asking that notice of contest be issued making said heirs parties.

Notice was accordingly issued and served on said heirs personally March 22, 1893, and the hearing set for May 2, 1893. By agreement

the hearing was continued to May 17, 1893, when the parties appeared by counsel, Hannah and Bourdet for Magner, and George C. Gorham, jr., for the heirs.

On motion of Gorham, that part of the affidavit of contest alleging that the land had not been reclaimed was stricken out for the reason that the time within which the reclamation might be made had not expired. To this ruling Magner excepted. Magner then offered in evidence the deposition of Amelia C. Hobart and Gorham objected to all that part which relates to the allegations stricken out of the affidavit, and refers to reclamation or ownership of water right. The objection was sustained and Magner excepted. The deposition of W. R. Carr and other evidence was submitted.

On June 8, 1893, the local officers rendered their decision.

Magner appealed from this decision to your office and on January 24, 1894, your office affirmed the decision of the local officers. The case is now before me on the appeal of Magner from your office decision.

The errors specified may be stated under two heads:

1st. That it was error to sustain the action of the local officers in striking one of the grounds of contest and in rejecting the depositions hereinbefore named.

2d. That it was error to hold that the three years within which the land might be reclaimed had not expired.

As to the first proposition, I find that the register and receiver, when they finally made up their decision, say that they considered the depositions first rejected by them, and they are sent up as a part of the record in the case. As these depositions related largely to the allegation stricken from the affidavit of contest, they must also have considered that. If there was any error in striking one allegation from the affidavit of contest, it seems clear that Magner was not injured by it.

As to the remaining proposition I understand the contention of Magner to be, that the rule laid down by Secretary Noble in reference to the suspended Visalia entries, in the case of the *United States v. Haggin* (12 L. D., 34), and followed by Assistant Secretary Chandler in the case of *Sharp v. Harvey* (16 L. D., 166), is bad law and should be overruled.

In these cases it is held that in all entries suspended by order of September 28, 1887, that—

the time between the date when said order of suspension became effective and the date of its revocation, will be excluded from the time within which the entryman is required to make proof of his compliance with the requirements of the law.

It is suggested that this rule is violative of the act of Congress prescribing the time within which desert lands must be reclaimed. The order is within the scope of administrative power. It neither adds to nor subtracts from the time prescribed by law within which entrymen of desert lands must make reclamation of them.

Your office decision being in accord with the rule laid down in the cases above referred to, is approved.

APPLICATION TO ENTER—APPEAL—SETTLEMENT RIGHT.

SUMMERS *v.* EAGLE.

The failure of an applicant for public land, to file a formal appeal from the rejection of his application to enter, will not defeat his rights in the premises, where by his subsequent diligence he secures an examination of the record by the General Land Office.

No rights on public land, as against adverse claimants, are secured by residence, where no steps are taken within the proper time to protect the alleged settlement right.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1895.
(G. C. R.)

On April 22, 1893, Elisha E. Eagle applied to make homestead entry for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 7, Tp. 25 N., R. 26 W., Springfield, Missouri. His application was rejected because it appeared from the records of the local office that the land applied for had been patented to the Atlantic and Pacific Railroad Company, November 29, 1870. It does not appear that Eagle was notified of the action so taken.

Prior to Eagle's application, and on February 22, 1893, John W. Summers addressed a letter to the local office, asking if the land was opened for entry; the register (McClury) informed him that the land was patented to the railroad company. On April 30, 1893, Summers again wrote to the local office, asking if Eagle had entered the land; the register replied (May 2, 1893,) stating that Eagle had applied to make entry, but his application was rejected because the land was already patented.

On account of certain representations made by Eagle, or his attorney, to the effect that the railroad company did not claim the land, but had conveyed it back to the United States, the register and receiver were induced to correspond with your office. On the very day that Eagle's application was rejected, for reasons above given, the register and receiver appear to have addressed a communication to your office, making the specific inquiry, as to whether the company had reconveyed the land. On May 1, 1893, your office made answer to this inquiry, stating that an examination of the files and records failed to show that the lands, which were patented to the company November 29, 1870, were ever reconveyed.

One Purdy had insisted that the land was reconveyed to the United States on May 5, 1871, by deed No. 663, and your office (May 1, 1893,) requested the data on which the assertion was based. Such data appear to have been furnished, and your office, on May 22, 1893, advised the local office that the lands had been so reconveyed, and were therefore subject to entry.

Summers, in the meantime, had made no application to make entry of the lands, but he had advised the local officers that he had resided thereon for five years, and had made certain improvements.

By reason of these statements, a hearing was ordered by the local officers to determine which had the better right to make entry. The register and receiver decided in favor of Eagle. On appeal, your office, by decision dated January 19, 1894, affirmed that action, and a further appeal brings the case here.

An examination of the record shows that Eagle's application and subsequent efforts caused the real facts as to the ownership of the lands to be unearthed, and the proper notations made. It is immaterial whether this was done directly by him, his attorney, or the local officers; if the correspondence was made at his instance, or upon his showing, it was the equivalent of an appeal, and he should not lose the results of his efforts, which alone brought out the real facts as to the status of the land.

The register and receiver could do nothing else than reject Eagle's application, because the evidence contained in their records showed they had no jurisdiction. But those records did not reflect the facts. The lands were in fact subject to entry when Eagle applied, and he lost no rights by failure to file a formal appeal, when he secured the same results, in another way, through the action of the register and receiver.

Summers, on the other hand, although living on the land, made no application until after Eagle applied to make entry and had shown that the land was a part of the public domain. Had Summers been more vigilant a different question would be presented. He can claim no rights by reason of his residence on the land, for he failed to take the necessary steps within the proper time to protect his settlement rights.

The local officers, moreover, held that the equities were with Eagle; but, without discussing that question, it is sufficient to say that Summers' five years occupancy of the land did not prevent others from making entry thereof, and that being public land it was subject to entry by the first qualified applicant, which in this case was Eagle.

The decision appealed from, awarding to Eagle the preference right of entry, is therefore affirmed.

REPAYMENT—HOMESTEAD ENTRY—FEES AND COMMISSION.

ELIZABETH ZENKER.

Where a second homestead entry is allowed the fees and commission paid on the first can not be returned, if said entry was not erroneously allowed and could have been confirmed.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1895.
(J. I. P.)

By your office letter "M" of May 29, 1894, you transmitted to this Department the appeal of Elizabeth Zenker from your office decision of March 14, 1894, denying her application for repayment of the fees and

commissions paid on homestead entry No. 8296, made June 26, 1891, on the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 15, T. 127, R. 69, Aberdeen, South Dakota, land district.

It appears that by mistake said entry did not cover the land which she took as a homestead, and that therefore she made application to have said entry canceled, and that she be allowed to file on another piece of land, to wit, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 5, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 127, R. 69, in said land district. By your office letter "C" of January 25, 1894, her application was granted, and her former entry canceled, and she was allowed to file upon the land last above described, and paid \$14 therefor.

She then filed her application for the return of her first filing fee of \$14, for the reason that she did not understand that the government would require that she pay the filing fee twice.

It does not appear from the above that said entry was canceled for conflict, or because of any fault of the government in allowing it, or that it was erroneously allowed and could not be confirmed. Hence her application does not come within the purview of the second section of the act of June 16, 1880 (21 Stat., 287). And as repayment by this Department cannot be made without statutory authority, (E. M. Dunphy, 8 L. D., 102; A. W. Givens, 8 L. D., 462) said application must of necessity be denied. See also F. A. White (17 L. D., 339), and A. L. Thomas (13 L. D., 359).

Your said office decision is therefore affirmed.

TIMBER LAND ENTRY—MARRIED WOMAN—TRANSFeree.

SAMUEL W. TATE.

In the absence of any adverse claim, a timber land entry made by a married woman, and held by a transferee, will not be canceled for want of the affidavit required of a married woman on submission of final proof, where her sole interest is set forth in the preliminary affidavit, and in the final proof it is alleged that the entry is made for her sole use and benefit, and where she declines and refuses to make such affidavit except on the payment of a further sum by the transferee.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1895.
(E. M. R.)

This case involves the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 8, T. 39 N., R. 1 W., Redding land district, California, and is before the Department upon appeal by Samuel W. Tate from your office decision of January 12, 1894, requiring Hattie Stevens, the transferrer, to make additional proof on account of the following irregularities: That there is no non-mineral affidavit submitted; that the witnesses used were not those named in the published notice, and that though in her affidavit, Hattie Stevens makes the married woman's affidavit required, no such statement was made in her proof.

The record shows that Samuel W. Tate, the appellant herein, purchased the above described tract from Hattie Stevens subsequently to the making of proof and prior to your office decision, and that the said Hattie Stevens refused to make the additional proof unless she be paid, what he alleges to be, an extortionate and unconscionable sum.

In the case of Katie Kentner (20 L. D., 102) it was held (syllabus):

The substitution of unadvertised witnesses, on the submission of final proof, by a timber land applicant, does not call for the rejection of said proof, where the substitution was made in accordance with existing instructions from the General Land Office.

It appears that the facts in this case are similar to those in the case *supra*. It was further held in that decision that:—

The non-mineral affidavit furnished by the appellant is substantially in accordance with the requirements of the timber land law and in view of the fact that the entry has already been made, I see no reason for now requiring an additional non-mineral affidavit.

In this case the usual non-mineral affidavit is made and clearly comes within the rule laid down above.

In reference to the remaining question: as this is an *ex parte* case (it not appearing that any one else is interested in the land), I am led to hold that the sworn statement of the entryman, made at the time she applied to enter the tract, that she "seeks to purchase the land with her own money, in which her husband has no interest or claim whatever," followed by the statement in her proof that the entry was made for her sole use and benefit, while not such a compliance with the terms of the statute as would render unnecessary the making of additional proof in the face of an adverse claim, is, under the peculiar circumstances of the case, sufficient.

Your office decision is accordingly reversed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

DAY ET AL. v. FOGG.

An entry erroneously canceled prior to the act of March 3, 1891, without opportunity of defense given to the entryman, or the bona fide incumbrancers, must be regarded, so far as the incumbrancers are concerned, as an existing entry, and therefore within the confirmatory provisions of section 7 of said act.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1895. (P. J. C.)

The land involved in this appeal is the SW. $\frac{1}{4}$ of Sec. 34, T. 112 N., R. 64 W., Huron, South Dakota, land district.

The record shows that Edwin J. Phillips made pre-emption cash entry of said tract August 20, 1883; that on October 1, 1883, he executed two mortgages on the same, one for \$275, to Martha R. Terry, executrix,

etc., and one for \$27.50 to F. T. Day, and that both were recorded October 20, 1883. On April 4, 1884, Phillips transferred the land to Walter E. Fogg for the expressed consideration of \$500, by warranty deed, which contained the covenant that "the same is free from all incumbrances whatsoever, except a mortgage for two hundred seventy-five dollars."

Under date of August 30, 1886, a special agent of your office reported that on investigation he had found that the entryman had no actual residence on the land; "stayed, eat, and slept continuously on adjacent tract;" that he had conveyed the land to Fogg, and that the deed was of record. He recommended "that the entry be held for cancellation. W. E. Fogg, the present claimant in case of cancellation of the Phillips entry deserves the privilege of entering in his own right which privilege I think should be granted."

It is stated that on September 13, 1886, an application was filed in the local office, based on affidavits of Fogg, in which he claims to have purchased the land in good faith, and had greatly improved the same; that he now verily believes that there are good grounds to question the proof of the entry party, "and asks that a hearing be granted," and in case his charges are sustained, or default is made by said Phillips, that he be allowed, after cancellation of said entry, to enter said tract in his own name, in order to protect his interests therein. (This affidavit is not in the files.)

It seems there had been no action taken by your office on the report of the special agent, but, by letter of September 9, 1887, after considering both the report and the application of Fogg, your office held—

It is true the ordinary way of securing preference right of entry is proposed by Mr. Fogg; (the transferee and claiming as sole owner at this time) but as under the circumstances now stated it clearly appears that the transferee practically confesses judgment, and claims he bought the land in ignorance of the real facts, and lived on and improved the land and there appears ample reasons for believing the same to be true;

Therefore I have this day canceled said pre-emption cash entry No. 3858, as above described, and you will note the same on your records in the usual manner. In thus canceling said entry, the actual settlement rights of any bona fide settler on said land will be recognized as of effect from date of cancellation of said entry; provided the same be asserted in due time.

Thereafter, on October 14, 1890, Fogg made homestead entry of said tract.

On June 24, 1892, the mortgagees presented a petition, setting forth the record facts, and alleging that Fogg had "paid the interest of said mortgage for some years, but concluding to defeat the mortgagee, he instituted proceedings against the entry of Phillips and caused its cancellation." They ask that a hearing be ordered "to establish the charges made."

Your office, by letter of July 25, 1892, ordered a hearing to enable the mortgagee to show cause why Fogg's homestead entry should be canceled and Phillips' cash entry reinstated. As a result of the hearing, the local officers recommended that Fogg's homestead entry

be held intact. On appeal, your office, by letter of November 28, 1893, reversed their action, and decided that Fogg's homestead entry be canceled; that the Phillips entry be reinstated; and that it "is confirmed by the provisions of section 7, of said act, and patent will issue therefor." Whereupon Fogg prosecutes this appeal, assigning numerous grounds of error, both of law and fact.

The testimony shows the execution of the mortgages; that they have not been satisfied, and the transfer of the land by Phillips to Fogg, subject to "a mortgage for \$275." Phillips swears that Fogg assumed the mortgages and promised to pay them. This is not denied. It also shows that "Phillips or some one for him" paid the interest due on the Terry mortgage due January 1, 1884. The second mortgage was due in annual instalments of \$5.50 each, and the first instalment due January 1, 1884, was paid in the same way the first interest was. The interest due on the Terry mortgage for 1885, 1886 and 1887, and the annual instalments for the same years on the other were paid by Fogg. This is all the testimony offered that tends to sustain the charges made.

I think it may be said in the light of this testimony that Fogg did in fact assume the payment of the mortgages. He certainly took the land with full knowledge of the incumbrances and subsequently paid the interest on one and the instalments due on the other, until he conceived the plan of taking the land himself.

It is only as a deduction from the facts here stated that it can be found that Fogg's intention was to defraud the mortgagees, and it is a question of doubt in my mind whether under the circumstances then existing his conduct should be construed as fraud, upon the mortgagees.

Phillips had personally made an affidavit before the special agent, which was sufficient in itself to cause the cancellation of his entry, if the proper course had been pursued, because he admitted he had not complied with the law as to residence on the land. In addition, there were other affidavits filed by the special agent, made by Fogg's immediate neighbors, who were thoroughly familiar with Phillips' acts, which were sufficient to cause a prudent man to be alert in the protection of his investment and labor, and as the law stood at that time, it seems to me that he took the only course in view to protect himself, because it was inevitable if the testimony could be produced in proper form, that the Phillips entry would be canceled.

It was error, however, in your office to cancel Phillips' entry in the manner in which it was done. Notice should have been served upon him in the first instance and he given an opportunity to defend it. This was not done, and the record is entirely silent as to whether he did or did not receive notice of the cancellation, or whether the mortgagees received any such notice.

The entry having been erroneously canceled, it follows that so far as the mortgagees are concerned, it must be considered as an existing entry. (*Costello v. Bonnie*, 20 L. D., 311.) This being so, the entry

must be confirmed under section 7 of the act of March 3, 1891 (26 Stat., 1095), because it appears that the land was transferred to bona fide incumbrancers for a valuable consideration prior to March 1, 1888, and no fraud has been found on the part of the mortgagees.

For these reasons your office judgment is affirmed.

COAL LAND—DECLARATORY STATEMENT.

CHARLES LYON.

A coal land declaratory statement can not be filed for unsurveyed land.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1895. (J. I. P.)

By your office letter "N" of June 1, 1894, you transmitted here the appeal of Charles Lyon from your office decision of March 19, 1894, rejecting his application to file coal declaratory statement for lots 1 and 2 of Sec. 25, T. 14 N., R. 7 E., and lots 5, 6 and 7, of Sec. 30, T. 14 N., R. 8 E., Santa Fe, New Mexico, land district.

Said application was made by Lyon September 7, 1893, and was rejected by the local office for the reason that all the land embraced therein, save lot 1, was unsurveyed public land and within the limits of the Ortiz Mining grant. Your office decision affirmed the action of the local office, but directed that Lyon should be permitted to file upon said lot 1, should he desire to do so.

The action of the local office and of your office are each declared to be based on the provisions of sections 2347, 2348 and 2349, Revised Statutes of the United States, and of the circular of July 31, 1882 (1 L. D., 687).

Under the provisions of section 2347, Revised Statutes, *supra*, entry of coal lands can only be made "by legal subdivisions," and if under section 2348, *supra*, it is desired to file a declaratory statement, it must be done when the township plat is on file, at the local office, within sixty days after the date of actual possession and the commencement of improvements, and when said plat is not on file at the local office, said filing must be made within sixty days from date of receipt of said plat at the local office.

It is evident, therefore, that neither an entry or filing is authorized upon unsurveyed lands, and the action of your office in the decision complained of was in accordance with law, and said decision is therefore affirmed.

HOMESTEAD ENTRY—OKLAHOMA LANDS—REHEARING.

BRUCKER *v.* BUSCHMANN.

A deed executed prior to the making of a homestead entry, purporting to convey land then owned by the entryman, and apparently made for the purpose of conveying the title in trust for the benefit of the entryman, will not defeat the inhibitory provision of the statute limiting the right of homestead entry to persons not owning one hundred and sixty acres of land.

A rehearing will not be granted where it appears that on the trial the defendant rested his case on a demurrer to the evidence that was then overruled, and, at such time, declined to introduce testimony on his own behalf.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1895.
(C. J. W.)

I have before me the appeal of William Buschmann from your office decision of February 24, 1894, holding for cancellation his homestead entry for NW. $\frac{1}{4}$, Sec. 8, T. 12 N., R. 3 W., Oklahoma City land district, Oklahoma Territory.

Said entry was made November 11, 1892. February 22, 1893, Daniel Brucker filed his affidavit of contest, alleging that at the time Buschmann made his said entry he was the owner in fee simple of one hundred and sixty acres of land in Oklahoma county, Oklahoma, to wit: NE. $\frac{1}{4}$, Sec. 32, T. 13 N., R. 3 W., I. M. That said William Buschmann shortly prior to the time he made entry for land embraced in his homestead, No. 5901, executed and delivered to one John Pfeiffer a deed for the last described tract of land, pretending to convey said land to said Pfeiffer, with the understanding, and for the purpose, that Buschmann might testify that he was not the owner of one hundred and sixty acres of land in any State or Territory, at the date of making said entry. That said deed was executed and delivered to Pfeiffer, without any consideration, with the understanding and agreement that the land was to be reconveyed to Buschmann without consideration, after he, Buschmann, had secured title to the land embraced in said entry.

On May 2, 1893, the parties appeared at the office of the register and receiver at Oklahoma City, in person and by counsel, when Brucker offered the testimony of one witness who testified, and the deposition of four other witnesses in evidence, to which Buschmann objected for the reason that their testimony was immaterial and incompetent.

Brucker rested and Buschmann demurred to the testimony introduced by Brucker, and the case was continued for argument until May 9, 1893, on which day the demurrer was overruled and Buschmann excepted.

On May 10, 1893, Buschmann filed a motion to set aside judgment on demurrer, for leave to amend the demurrer, and for review of the decision on demurrer. The leave to amend was granted and the hearing set for Monday, May 15, 1893.

It appears from the decision of the register and receiver and your office decision only, that on May 15, 1893, the demurrer, as amended,

was overruled, and that defendant refused to introduce testimony in his own behalf and rested his case on the demurrer.

Of the various grounds of error specified it seems only necessary to consider the one in relation to the effect of the deed from Buschmann to Pfeiffer, and the one alleging that a further hearing should have been ordered.

If the deed from Buschmann to Pfeiffer, regular upon its face, was made in an ordinary business transaction, and was an honest and unconditional transfer of the fee simple title to the land it describes, then Buschmann was a qualified entryman when he made his entry. In determining the significance of this deed, the question of good faith is important. It appears that the homestead entry was made three days after the execution of the deed in question. The vendor and vendee were living together in the same house. The consideration expressed in the deed is thirty-five hundred dollars. No part of the purchase money was paid. No definite time for its payment was agreed upon; no written evidence of the indebtedness was entered into. The testimony of Pfeiffer, and his wife and daughter, was to the effect that the land was to be paid for when it was sold. No other stipulation was made as to time within which payment was to be made. The usual accompaniments of a bona fide trade involving a large sum of money are entirely wanting here. Construing this deed in the light of the parol testimony and the circumstances attending its execution, it seems to me to be a deed conveying the title to the land it describes, to Pfeiffer in trust, for the benefit of Buschmann, until such time in the future as the land may be sold to some third party for not less than thirty-five hundred dollars. Buschmann was, at the time of entry, the owner of the beneficial interest in the land, notwithstanding this deed.

In my opinion, the evidence warranted the conclusion reached, that this trade was entered into in bad faith and for the purpose of evading and defeating the law in reference to homestead entries in Oklahoma, in its spirit and intent.

The other grounds of alleged error have reference chiefly to testimony objected to as incompetent or irrelevant, and under the view which I take of the case, require no separate consideration. There remains, however, this question: Is Buschmann entitled to a further hearing? In the prefatory statement of the history of the case, included in the decision of the register and receiver, occurs this sentence:

The motion came up for hearing on the demurrer as amended on May 15, 1893, and said amended demurrer was overruled. Whereupon defendant refused to introduce testimony in his own behalf and rested his case on the demurrer.

Service of notice of the decision, including above statement, was accepted by counsel for defendant May 26, 1893. It is now insisted that the above statement of the register and receiver is not true in fact and that the record does not support it. It would have been better practice if this statement had been entered upon the amended demur-

rer and signed by the register and receiver. It is to be noted, however, that Buschmann does not allege that he offered to introduce testimony and was refused the privilege, neither is any evidence whatever produced to support the naked assertion that the statement of the register and receiver is untrue. In the absence of proof sustaining this charge, the official statement of the register and receiver will be taken as true and correct.

I see no good reason why any further hearing should be had, and approve your office decision affirming the decision of the register and receiver.

TIMBER LAND ENTRY—PROOF AND PAYMENT.

JOHN M. McDONALD.

There is no authority under the law to allow a timber land applicant, who has published notice of intention to purchase a tract, to republish the notice, and thereafter make proof and payment, and thus in effect secure additional time in which to pay for the land.

Secretary Smith to the Commissioner of the General Land Office, June 13, 1895. (J. L.)

The land involved in this case is the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 13, T. 59 N., R. 17 W., 4th principal meridian, Duluth land district, Minnesota.

On the 29th of March, 1893, John McDonald filed his sworn statement of his desire to purchase said tracts of land under the timber and stone act of June 3, 1878 (20 Stats., 89), as amended by the act of August 4, 1892 (27 Stats., 348). The local officers furnished him for publication a notice in which they specified the land office at Duluth as the place where, the 29th day of January, 1894, as the time when, and the register and receiver as the officers before whom, he should offer the proof required by law and regulations. (See General Circular, 1892, page 36, paragraph 10, and Circular of September 5, 1889, in 9 L. D., 384).—

McDonald appeared on the day named, January 29, 1894, proved the publication of the notice, and instead of offering proof and making payment as required by the regulations in General Circular of 1892, page 37, paragraphs 12 and 13, he submitted an application for the issuing of another notice and the fixing of another day for proof and payment. Said application was transmitted to your office for consideration and action. On March 10, 1894, your office rejected the application, and McDonald has appealed to this Department.

The only ground alleged in support of the application is, that the times are hard and that McDonald has no money.

Circular of Instructions from your office, dated May 1, 1880 (See Copp's Land Laws, p. 1458), recites that—

It has come to the knowledge of this office that many persons have taken the preliminary steps up to the point of making proof and payment, but have failed in the

last essential particular. In effect they withdraw the land from market on your records by making the application, sworn statement and publication, and then denude the land of its timber. The tract becomes valueless, and the entry is not made.

Thereupon the local officers were instructed to notify all applicants that their sworn statements would be cancelled, unless they made necessary proof and payment within ninety days from the date of the original application in each case.

Circular of May 21, 1887 (6 L. D., 115), following the line of the policy above indicated, prescribed as follows:

10. The published notice required by the third section of the act must state the time and place when, and name the officer before whom the party intends to offer proof, which must be after the expiration of sixty days of publication, and before ninety days from the date of the published notice. Where proof is not made before the expiration of said ninety days, the register and receiver will cancel the filing upon their records. (See also Par. 13, on page 116, 6 L. D.)

Circular of September 5, 1889 (9 L. D., 384), after referring to the circulars above quoted from, recites and prescribes as follows:

Cases having arisen, in the Seattle, Washington Territory, land district, in which it was found impracticable, from the pressure of business, under the various laws for the disposal of the public lands, for the district land officers to properly consider and act upon all the cases arising under the said act within the period of ninety days, as prescribed, the matter was submitted for the consideration of the honorable Secretary of the Interior, and an expression of his views elicited, as per letter from the acting Secretary to this office of the 22d ultimo. Concurring with the views therein expressed, I am of opinion that the ninety days regulation referred to should not be longer continued, and it is hereby dispensed with. The registers will hereafter fix the date for making proof of payment in the notices furnished by them, in this class of cases, at a reasonable time, after due publication, having due regard to the exigencies of business at their respective offices.

These regulations are reiterated in the last General Circular of February 6, 1892, pages 36 and 37, paragraphs 10 to 13, inclusive.

In defiance of said regulations McDonald procured in the first instance indulgence for ten months within which to make proof and payment. Your office decision states and shows by the records of your office, that said indulgence was granted without regard to the exigencies of business at the local land office. A person who applies to purchase timber land and files his sworn statement, without knowing that he has the money to consummate the purchase, does not act in good faith. He is like an impecunious bidder at an auction sale. The government will not withhold from disposition valuable timber lands for an indefinite length of time, or for any time after the day fixed for proof and payment, in order to give fortune an opportunity to smile upon the would-be purchaser, or to promote a possible speculation.

Your office decision is hereby affirmed. McDonald's application will be cancelled.

CLASSIFICATION OF MINERAL LANDS.

INSTRUCTIONS.

Secretary Smith to the Commissioner of the General Land Office, June 20,
(J. I. H.) 1895. (F. W. C.)

I am in receipt of your office letter of June 6, 1895, making report upon letter dated May 16, 1895, from the Mineral Land Commissioners appointed for the Helena land district, Montana, under the provisions of the act of February 26, 1895, which provides for the classification of lands in Montana and Idaho, within the limits of the grant for the Northern Pacific Railroad company.

The Commissioners report that a copy of the official map showing the limits of the land-grant within the Helena land district, is necessary, and I have to direct that you furnish them with a copy of the diagram desired, and also to advise them that, as stated in the third paragraph of the instructions contained in circular of April 13, 1895, they can obtain all plats and diagrams necessary to enable them to proceed with their duties, upon proper application to the United States surveyor-general, the local office at Helena, Montana, and your office.

As to the services of a surveyor to aid them in establishing lost corners, etc., I approve your suggestion and have to direct that they be advised to call upon the United States surveyor-general, who will designate a United States deputy surveyor to assist them in this work.

Their request for a competent stenographer must be denied, as suggested by you, for the reason that the act of February 26, 1895, makes no provision for clerks to the various boards. Should, however, protracted hearings be necessary, the advisability of appointing a stenographer will then be considered.

The Commissioners ask for a modification of the instructions of April 13, last, which directs that they complete and write out the minutes of each day's business "before the next day's business shall have begun" so as to allow them to write up their minutes from notes taken in the field, upon their return to Helena, each month. As the purpose of the regulation prescribed was to secure the greatest accuracy and uniformity, I agree with the recommendation of your office that the modification be not allowed, and have to direct that the Commissioners be advised accordingly.

The third paragraph of their letter is devoted to the question of compensation allowable for work performed on Sundays. The act provides that the Commissioners shall receive for their compensation "ten dollars for each day they may be actually engaged in the performance of their duties, which shall include their transportation and subsistence expenses, but the total amount of compensation to be paid to each Commissioner shall in no case exceed the sum of \$2,500."

Under this law the compensation is limited to \$10 per day for each day actually engaged in the performance of duty in the matter of the

classification of these lands. I can see no necessity for the performance of these duties on Sundays, and must, therefore, hold that they are not entitled, under the law, to an allowance for Sundays, and you will so advise them.

As to the fourth and last paragraph contained in their letter, I have to direct that under the head of eliminations from classification of "all tracts for which patent is issued" should be included entries in which final certificates have issued and remain of record, although patent has not issued thereon, and you will advise them accordingly.

Herewith is returned the letter from the Commissioners for instructions to be given by your office in accordance with the directions herein contained.

SIoux INDIAN LANDS—ALLOTMENT.

CROW *v.* KNOWLES ET AL.

The right of an Indian under section 13, act of March 2, 1889, to take as his allotment the lands upon which he is residing at the time said act becomes effective, if asserted in accordance therewith, cuts off all intervening adverse claims.

Secretary Smith to the Commissioner of the General Land Office, June 17, 1895. (W. F. M.)

On April 3, 1890, Charles Knowles made homestead entry of lot 7 of section 25 and lots 2 and 3 and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 26, and on April 7, 1890, John M. Fairburn made homestead entry of lot 3 and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 26, and on September 16, 1890, George W. Hice made homestead entry of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 2 and 3 of section 35, and on October 5, 1891, Elmer E. Hice made homestead entry of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 26, and on July 9, 1891, Teen Fenengo made homestead entry of lots 4 and 5, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 35, and on July 6, 1891, John W. Smith made homestead entry of the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 27, all in township 101 N., range 71 W., 5th principal meridian, South Dakota.

This land lies within the ceded part of the great Sioux reservation in South Dakota which was opened to settlement and entry by the act of March 2, 1889 (25 Stat., 888), and the executive proclamation of February 10, 1890, issued pursuant thereto, section 13 of which provides—

that any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect, but residing upon any portion of said Great Reservation not included in either of the separate reservations herein established, may, at his option, within one year from the time when this act shall take effect, and within one year after he has been notified of his said right of option in such manner as the Secretary of the Interior shall direct by recording his election with the proper agent at the agency to which he belongs, have

the allotment to which he would be otherwise entitled on one of said separate reservations upon the land where such Indian may then reside, such allotment in all other respects to conform to the allotments hereinbefore provided.

Within a year from the time when the act became effective, to wit, on January 24, 1891, John Bob Tail Crow, an Indian, belonging to the Lower Brule Agency, and "receiving and entitled to rations and annuities" thereat, filed his declaration of election to take allotment for himself and his six minor children, all under the age of eighteen years, on ceded lands upon which he had been residing, not included in any of the separate reservations established by the act, as follows, to wit, section 34, lots 2, 3, 4 and 5 and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 35, lots 2, 3 and 7 and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of section 26, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 27, township 101 N., range 71 W., 5th principal meridian, South Dakota, amounting in the aggregate to 1291 acres.

At the instance of a special agent of the General Land Office, who pointed out the conflict between the several homestead entries hereinbefore mentioned and the claim of the Indians, John Bob Tail Crow and his children, your office, by letter "H" of April 30, 1892, ordered a hearing before the register and receiver of the Chamberlain, South Dakota, land office, "to the end that the facts may be shown."

The local officers, after the hearing, rendered separate opinions, the register finding for the allottees and the receiver holding that "John Bob Tail Crow would be permitted to take three hundred and twenty acres of land where his improvements are in section 35 and so much other land as he may be entitled to for his children, contiguous thereto, where no adverse rights have attached," and treating the homestead entries as valid adverse rights in so far as they affect lands outside of section 35, on which the Indian resided.

The matter having been appealed to your office, it was there held that the claim of Crow and his children is clearly within the provisions of the 13th section of the act of March 2, 1889, and has been asserted in strict conformity with the requirements of the Presidential proclamation of February 10, 1890. Crow being, and having been, as testimony shows, for some ten years resident upon a tract of ceded land, gave notice within the period limited by the statute, of his claim to said tract and divers contiguous tracts of an aggregate area not in excess of that to which he and his minor children were entitled, it seems to me too clear for argument that this right of election when properly and seasonably notified to the register and receiver, entitles the Indian to the land claimed and cuts out any adverse rights asserted within the year.

The homestead entrymen in appealing the case here urge that the judgment of your office is contrary to the law and the evidence, insisting that the testimony does not disclose any exercise by Crow of his right of election, and asserting that he has no intention of exercising it, but on the contrary that it is his purpose to remove to the reservation to which he is by law attached.

It is true that the testimony bearing upon Crow's intentions is not so full and convincing as could be wished; it leaves no doubt, neverthe-

less, that he has for many years resided upon part of the land, and this fact taken in connection with his formal election, duly filed at the appropriate agency, seems to be sufficient, for the present, at least, to establish his right. What action might, or should be taken in the event of abandonment by him of the tracts which he has elected to take is a question that is not at this time before the Department.

These allotments of ceded lands are required to "conform to the allotments hereinbefore provided," reference being had to the provisions of section 8, which allows in allotment

to each head of a family, three hundred and twenty acres; to each single person over eighteen years of age, one fourth of a section; to each orphan child under eighteen years of age, one fourth of a section; and to each other person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one eighth of a section.

This section also contains a proviso

that where the lands on any reservation are mainly valuable for grazing purposes an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

If, therefore, the tracts selected by Crow are grazing lands he is entitled to 1280 acres for himself and his six children under eighteen years of age; if, on the other hand, they are not grazing lands, then he is entitled to only 800 acres. The aggregate area of the tracts he has elected to take, as shown by the plats, is 1291 acres, eleven acres in excess of that to which he is entitled in any event, but if the lands belong to the former of the two classes enumerated in the statute, as would seem to be the case, the decision appealed from need not be disturbed on that account. *De minimis lex non curat.*

The decision of your office is, therefore, affirmed in so far as it holds for cancellation the entries of Knowles *et al.*, to the extent of their conflict with Crow's claim, the measure of the latter to be determined by your office in the customary way according to the rules herein announced.

MINING CLAIM—CHARACTER OF LAND.

MCCCHARLES v. ROBERTS.

Where a hearing is asked in order to show the alleged agricultural character of a tract held as a mining claim, and that has once been adjudged mineral, in proceedings instituted to determine the character of the land, the agricultural claimant should be required to allege and prove the abandonment or forfeiture of the mining claim.

Secretary Smith to the Commissioner of the General Land Office, June 17, 1895. (P. J. C.)

The land involved in this controversy is the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 19, T. 16 N., R. 8 E., M. D. M., Sacramento, California, land district.

The controversy between these parties is quite an ancient one, and in order that there may be a thorough understanding of the situation, it is necessary to go back of the present controversy.

The official plat of this township was filed in February, 1868, and on May 7, following Harrison McCharles filed his pre-emption declaratory statement for the land in controversy, and other lands, alleging settlement in August, 1853.

It seems that Edward W. Roberts *et al.* filed an affidavit of contest, alleging that said land was mineral in character. A hearing was had upon this charge, at which the local officers determined that the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said section was agricultural, and that the balance was mineral land.

An appeal was taken, and your office, by letter of October 24, 1871, reversed the action of the local officers in holding the forty described to be agricultural, and held that the entire tract was mineral in character. No appeal from this decision was taken.

The matter thus rested until October 17, 1887, when Edward W. Roberts presented his application to enter the land in controversy, and other land adjoining it, as the Sazarac Placer.

On November 26, 1887, Harrison McCharles filed an affidavit of contest against the application, alleging that the land has no value for placer deposits, or for mineral, and that the same is agricultural in character. He alleges his continuous residence upon the land since 1853, and improvements thereon, and asks for a hearing to determine "1st, the character of said land; and 2nd, the rights of the petitioner thereto as against the Southern Pacific Railroad Company."

Your office declined to order a hearing in the matter, for the reason that McCharles' affidavit was not corroborated. This defect was cured, however, and your office, by letter of January 9, 1888, instructed the local officers to order a hearing "to determine the *present* value of said lands, and whether of more value for agricultural than for mining purposes." In said letter the attention of the local officers is called to your office judgment of October 24, 1871, and to the fact that the Central Pacific Railroad Company is not involved in the controversy, and is therefore not a party in interest.

A hearing was ordered by the local officers, but on the day set therefor, April 26, 1888, this was filed,—“It is hereby stipulated and agreed by and between the parties to the above entitled cause that the same be dismissed, on the motion of the agricultural claimant.” This was signed by the attorney for McCharles and by Roberts in person.

The entry seems to have rested again until some time in June, 1889, when Roberts, having submitted final proof under his application, applied to purchase the same, but the purchase price not having accompanied his application, the local officers rejected it, and so notified him.

About the same time information was communicated to the local officers to the effect that Roberts had not complied with a certain agree-

ment made with McCharles, at the time set for the hearing in the first instance, and that he declined to do so. McCharles therefore asked for a reinstatement of his former contest, which your office, by letter of May 17, 1890, granted, and instructed the local officers to proceed with the hearing as ordered by your office letter of January 9, 1888.

The hearing was accordingly ordered, which took place before the receiver August 4, 1890.

It seems that about this time Roberts was appointed register of the land office at Sacramento, but he did not sit in the trial of the case.

The testimony being completed before the receiver, he, on March 30, 1892, rendered his individual opinion, holding the land to be more valuable for mineral than for agricultural purposes, and recommending that the contest be dismissed.

The contestant appealed, and your office, by letter of April 6, 1893, held that under the decision in the case of *Emblin v. Weed* (16 L. D., 28), it was necessary that both officers should join in the decision. At the same time your office vacated and set aside said judgment of the receiver.

In the meantime there had been a new set of officers appointed, the record was retransmitted to them, with instructions to examine the same and make their report thereon. This they did, using the former decision of the receiver *in hæc verba*, with a caption thereto reciting the fact of its retransmission, and adding at the conclusion thereof,—“A second examination of the evidence in this case leads us to coincide with the above opinion of the late receiver, and we so accordingly decide,” signed by the local officers.

McCharles appealed, and your office, by letter of October 7, 1893, affirmed the judgment below.

On November 6, 1893, the contestant filed a motion for review, and your office, by letter of December 6, 1893, overruled the motion; where upon the contestant prosecutes this appeal, assigning numerous grounds of error, both of law and fact.

In the recent case of *Dargin et al. v. Koch* (20 L. D., 384), there was a former judgment declaring the land to be mineral. Subsequently the agricultural claimant attacked the mineral entry, alleging abandonment and failure to do annual assessment work, and a hearing was ordered “to determine the character of this land, as has been shown by all the developments and work done thereon up to this date.” The judgment was that the land was not more valuable for mineral. This judgment was sustained by the Department, or more accurately speaking, it was decided that the local office had jurisdiction to order the hearing. In discussing the right to the second hearing it was said—

If subsequent development demonstrates that the mineral then found had disappeared, or the vein has been worked out, or that it is worthless and unprofitable to work as a mining claim, and abandoned as such, it is not in any just sense a re-adjudication of the former issues.

In *Stinchfield v. Pierce* (19 L. D., 12), the first judgment found the land to be agricultural. The mineral claimant subsequently attacked the entry. It was held by the Department that all testimony as to the mineral character of the land prior to the first judgment should be eliminated from the record, and the mineral claimant confined to what has been developed since; that

it being the settled policy of the government to encourage the production of the precious metals, I think that if it can be shown that by subsequent development it has been demonstrated that the land is more valuable for its minerals than for agricultural purposes, it may be done. But the testimony in such a case would have to be clear and unmistakable, such as to carry conviction beyond a possible doubt.

It will thus be seen that under the rulings of the Department, where the question is as to whether the land is more valuable for agricultural or mineral, a former judgment is only binding up to the rendition of the final judgment, and that it may be shown that subsequent exploitation has changed the character of the land. The burden of proof, however, rests upon the party attacking the entry, and the testimony must be conclusive to warrant a reversal of the former judgment.

It seems to me, however, that where the agricultural claimant is seeking to have the former judgment reversed he should allege and prove abandonment or forfeiture of the mining claim; that after a final judgment declaring land to be mineral in character the simple allegation that the land is as a present fact more valuable for agriculture is not sufficient upon which to order a hearing, and again compel the mineral claimant to adjudicate the question. The only specific requirement of the statute to perpetuate a mining location is that there shall be expended thereon in labor and improvements one hundred dollars per annum (section 2324, Revised Statutes). So long as he continues to comply with the requirements of the statute, after a judgment in his favor, he should not be harrassed by being forced into a contest except upon substantial and meritorious grounds.

Applying these tests to the case at bar, it is clear your judgment must be affirmed. The testimony submitted by McCharles was very largely devoted to what transpired prior to 1871. The comparatively small portion which refers to a later date shows that Roberts has done some work on the land in preparing it for convenient working, and has taken some mineral therefrom. Neither forfeiture or abandonment is shown.

Your office judgment is therefore affirmed.

ABANDONED MILITARY RESERVATION—ACT OF FEBRUARY 15, 1895.

INSTRUCTIONS.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 17, 1895. (F. W. C.)

I am in receipt of your office letter of March 14, 1895, submitting for my consideration and approval, draft of a proposed circular addressed to registers and receivers, giving instructions under the act of Congress approved February 15, 1895, entitled "An act to amend and extend the provisions of an act entitled 'An act to provide for the opening of certain abandoned military reservations, and for other purposes,' approved August 23, 1894."

Said act provides:

That the provisions of the act approved August twenty-third, eighteen hundred and ninety-four, entitled "An act to provide for the opening of certain abandoned military reservations, and for other purposes," are hereby extended to all abandoned military reservations which were placed under the control of the Secretary of the Interior under any law in force prior to the act of July fifth, eighteen hundred and eighty-four.

The provisions of the act of August 23, 1894, referred to are limited to any abandoned military reservation the area of which exceeds five thousand acres theretofore placed under the control of the Secretary of the Interior for disposal under the act of July 5, 1884, and your construction of the act of February 15, 1895, under consideration, is that the same is also limited in its operation and applies only to the class of reservations therein referred to, the area of which exceeds five thousand acres, and not to reservations which were placed under the control of the Secretary of the Interior under any law in force prior to the act of July 5, 1884, irrespective of the area they contain.

With this construction I agree, and the circular as submitted is approved and is herewith returned.

In the letter of transmittal you call particular attention to the Fort Jupiter abandoned military reservation in Florida, which was held by departmental decision of November 22, 1894 (19 L. D., 477), should be disposed of in accordance with the provisions of the act of August 18, 1856, but in relation to which you were verbally instructed to suspend action looking to the disposal of the same pending the result of legislation then pending, and in view of the act of February 15, 1895, you suggest that the verbal order of suspension might be vacated and that your office be permitted to instruct the local officers at Gainesville, Florida, to proceed with the disposal of said lands in accordance with the provisions of the acts mentioned.

I have therefore to direct that the verbal order be no longer regarded, but that you proceed to instruct the local officers in the matter of the disposal of said Fort Jupiter reservation as suggested in your office letter.

ABANDONED MILITARY RESERVATION—ACT OF FEBRUARY 15, 1895.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 17, 1895.

REGISTER AND RECEIVER, UNITED STATES LAND OFFICES.

GENTLEMEN: Attached is a copy of the act of Congress approved February 15, 1895, entitled "An act to amend and extend the provisions of an act entitled 'An act to provide for the opening of certain abandoned military reservations, and for other purposes,' approved August twenty-third, eighteen hundred and ninety-four."

It will be observed that by the first section of the said act of February 15, 1895, the provisions of the act of August 23, 1894, are extended to all abandoned military reservations which were placed under control of the Secretary of the Interior under any law in force prior to the act of July 5, 1884.

The provisions of the act of August 23, 1894, are limited to any abandoned military reservations which were prior to its passage, placed under control of the Secretary of the Interior under the act of July 5, 1884, the disposal of which has not been provided for by subsequent act of Congress, where the area exceeds 5,000 acres. The present law makes the provisions of the act of August 23, 1894, applicable also to any such reservation, which contains an area in excess of 5,000 acres, and which was placed under the control of the Secretary of the Interior under any law in force prior to July 5, 1884.

As regards the disposal of lands in any abandoned military reservation limited to an area which exceeds 5,000 acres, and transferred to the custody of the Secretary of the Interior under any law in force prior to July 5, 1884, you will be governed by the instructions contained in the circular of December 1, 1894, under the act of August 23, 1894, (19 L. D., 392), a copy of which has been sent to you.

You will also observe that by the second section of the law under consideration, it is provided that the preference right of entry given to actual settlers by the terms of the act of August 23, 1894, shall take effect and continue for six months from the date of the passage of said act of February 15, 1895.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

[PUBLIC—No. 51.]

An Act To amend and extend the provisions of an Act entitled "An Act to provide for the opening of certain abandoned military reservations, and for other purposes," approved August twenty-third, eighteen hundred and ninety-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act approved August twenty-third, eighteen hundred and ninety-four, entitled "An Act to provide for the opening of certain abandoned military reservations, and for other purposes," are hereby extended to all abandoned military reservations which were placed under the control of the Secretary of the Interior under any law in force prior to the act of July fifth, eighteen hundred and eighty-four.

SEC. 2. That the preference right of entry given to actual settlers by the terms of the act to which this is an amendment shall, so far as the lands to which the provisions of said act are extended, take effect and continue for six months from the date of this amendatory act.

Approved, February 15, 1895.

SUPERVISORY JURISDICTION—FINAL PROOF PROCEEDINGS.

LANGFORD *v.* BUTLER.

In the absence of an adverse claim, and where a showing of good faith is made, a pre-emptor may be allowed to submit new final proof, where the first is found irregular and insufficient, and for said reasons is rejected.

Secretary Smith to the Commissioner of the General Land Office, June 19, 1895. (J. L.)

Since the promulgation of my decision of April 13, 1895, 20 L. D., 350, denying Sidney H. Butler's application for a review and modification of my decision of January 30, 1895, id., 76, in this case, Butler has filed his own affidavit, dated May 11, 1895, in which he states that since said decision "he has married and is now the head of a family; and ever since the date of his said marriage he and his family have continued to reside upon and make their home on said land to the exclusion of one elsewhere, and propose to continue to do so."

I see no reason to modify the opinions expressed in the two decisions above referred to. But in consideration of the fact stated in the affidavit aforesaid; and of the further fact that there does not appear to be any adverse claimant as to lots 6 and 7 and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 18, T. 30 N., R. 20 W., Missoula land district, Montana, I hereby authorize your office to reinstate Butler's declaratory statement as to the said lots 6 and 7 and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 18, and permit him to offer new final proof as to those three subdivisions, after due publication, subject to protest and contest, as usual, and in accordance with the opinions expressed in my two decisions aforesaid.

My letter of May 1, 1895, instructing you to suspend action in this case until further advised, is hereby revoked.

CLASSIFICATION OF MINERAL LANDS—PROCEDURE—WITNESSES.

ADDITIONAL INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., June 25, 1895.

To the Commissioners to Classify Mineral Lands, United States Land Districts of Helena, Bozeman and Missoula in Montana, and Cœur d'Alene in Idaho.

SIRS: I am in receipt of a letter dated May 10, 1895, from the Board of Commissioners, Missoula, Montana, submitting certain questions under the Act of February 26, 1895, (Circular approved April 13, 1895), and for the information of the several boards, these supplemental instructions are issued.

The questions submitted are as follows:

- I. Shall we examine *all* the lands, or only the odd sections?
- II. Shall we make our own plats and copy the field notes, or shall the officers of the local land office furnish them, or will the Interior Department allow us a clerk to make them?
- III. Who will serve our summons for witnesses and how shall the witnesses be paid?
- IV. Shall all the examinations of witnesses be conducted at the land office or at such place as we shall designate?
- V. When the testimony clearly shows the character of the land, shall we personally inspect it?

INSTRUCTIONS.

I. You will examine *for the purpose of classification* odd numbered sections within the grant, *only*. Attention is, however, called to Section 3 of the Act of February 26, 1895,—paragraph IV—c of Circular of April 13, 1895,—which requires that the Commissioners “shall take into consideration” (for the purpose of determining the proper classification of the odd numbered sections) “the mineral discovered or developed on or *adjacent to such land*, and the geological formation of all lands to be examined and classified *or the lands adjacent thereto*” etc.

II. No provision is made in the Statute for the appointment of clerks to the various boards of commissioners. Commissioners will therefore be expected to themselves perform the necessary clerical duties.

It will be observed that the last proviso of Section 3 of the act provides, “That the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification”.

This proviso would appear to prohibit your classification being based on any general information as to the character of the lands obtained from an examination of the office records, except that “where mining

locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the forty-acre subdivision within which it is located is mineral land." It will therefore, be necessary to procure from the official records, data relative to the locus of the lands subject to classification, and to mining claims of record, only.

III. You are directed to issue subpoenas, in the same manner and form as are issued by United States Circuit Court Commissioners. The fees for service of such subpoenas and for the payment of witnesses so summoned shall be the same as are allowed in proceedings before the United States Circuit Court Commissioners. (Sections 829, 848 and 849 of the Revised Statutes of the United States.)

As the appropriation for payment of the Commissioners and all other expenses is small, and as the appropriation is to be expended under the order of the Secretary of the Interior, you should have his permission to summon witnesses. In order, therefore, that the Secretary may correctly determine from time to time whether the appropriation will be sufficient to authorize the payment of such expenses, you will furnish this office a list of witnesses that you propose to examine, the distance they will be required to travel, and a statement of the probable cost of witness fees, mileage and the cost of serving summons.

(a) *Subpoena for witnesses.*

UNITED STATES OF AMERICA

Land District of ——— ss:

The President of the United States to (names of witnesses) Greeting:

You are hereby commanded to be and appear, without excuse or delay, before the Board of Commissioners appointed under the Act of February 26, 1895, in and for the said district, at ——— on the ——— day of ——— 189—, then and there to testify in a certain examination pending before said Board of Commissioners, relative to the true character of the ——— of Sec. ——— T. ——— R. ——— Hereof fail not.

In witness whereof we have hereunto set our hands at ——— in said district, this ——— day of ——— 189—.

Commissioners.

(b) Each witness so summoned and in attendance before you, will be required to file an affidavit in the following form:

UNITED STATES OF AMERICA

Land District of ——— ss:

Before me ——— a Commissioner to classify mineral lands under the Act of February 26, 1895, in and for said district, personally comes ——— who, being duly sworn upon oath, says, that he has attended the examination in the matter of (here insert particulars) from ——— day of ——— 189—, to and including ——— day of ——— 189—, as a witness, and that he is entitled to fees for attendance and mileage, the distance charged for being by the usual route traveled, as follows:

——— days at \$1.50 per day..... \$.....
——— miles traveled at 5 cents per mile..... \$.....
..... \$.....

Subscribed and sworn to before me this ——— day of ——— 189—.

Commissioner.

The witness' receipt signed in blank should accompany the affidavit of attendance.

(c) Service of subpoenas may be made as prescribed in rule 10 of practice, and proof thereof shall be the same as prescribed by rule 15 of practice—Edition of August 6, 1894.

(d) The person serving such subpoenas shall make affidavit in form as follows:

UNITED STATES OF AMERICA

Land District of _____ *ss:*

Before me _____ a Commissioner to classify mineral lands under the Act of February 26, 1895, in and for said district personally comes _____ who, being duly sworn upon oath, says that upon the _____ day of _____ 189—, he served subpoena upon _____ a witness summoned to appear before the Board of Commissioners for the said land district on the _____ day of _____ 189—, in the matter of (here insert particulars) and that he is entitled to fees and mileage, the distance charged for being by the usual route traveled, as follows:

Fee for service of subpoena.....	\$0.50
_____ miles traveled at 6 cents per mile.....	\$.....
	\$.....

Subscribed and sworn to before me this _____ day of _____ 189—.

_____ Commissioner.

The party's receipt signed in blank should accompany the affidavit last above noted.

(e) The affidavits and accompanying receipts shall be filed as provided in paragraph XI b. of Circular of April 13, 1895, and the accounts will be audited as therein provided.

Witnesses should not be formally summoned as provided by Sec. 2 of the Act unless such action is absolutely necessary to arrive at a determination as to the character of any particular tract of land.

You should avoid all unnecessary expense in this particular, and to this end should rely on voluntary services and testimony whenever such can be secured.

It is thought that you will find a sufficient number of persons interested in having made a correct classification of the lands involved, to render unnecessary the incurring of much expense in this regard.

IV. Witnesses may be examined at such times and places as you find most convenient and economical, in your discretion.

V. You will take such testimony relative to, and make such personal inspection of the lands involved as will *satisfy your judgment* as to the proper classification thereof.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

WM. H. SIMS,
Act'g Secretary.

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